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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

STEPHEN POHLOT,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals For the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I.

HAS A DEFENDANT BEEN DEPRIVED OF HIS FIFTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL WHEN A JUDGE REFUSES TO INSTRUCT A JURY, AS PER THE DEFENDANT'S REQUEST, THAT IT MAY CONSIDER PSYCHIATRIC TESTIMONY IN DECIDING WHETHER THE DEFENDANT HARBORED THE SPECIFIC INTENT REQUIRED BY THE CRIME CHARGED?

II.

IN ENACTING THE INSANITY DEFENSE REFORM ACT, 18 U.S.C. §17 AND 18 U.S.C. §704(b), DID CONGRESS INTEND TO BAR THE INTRODUCTION OF PSYCHIATRIC TESTIMONY CONCERNING A MENTAL STATE REQUIRED BY THE CRIME CHARGED?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION	2
STATEMENT OF THE CASE	2
A. PROCEDURAL HISTORY	2
B. FACTUAL HISTORY	3
REASONS FOR GRANTING THE WRIT	9
A. INTRODUCTION	9
B. THE TRIAL JUDGE, BY FAILING AND REFUSING TO INSTRUCT THE JURY THAT EXPERT PSYCHIATRIC TESTIMONY COULD BE CONSIDERED IN DECIDING WHETHER PETITIONER HARBORED THE SPECIFIC INTENT REQUIRED BY THE CRIME CHARGED, MISREAD CONGRESS'S INTENT IN ENACTING 18 U.S.C. §17 and 18 U.S.C. §704(b), AND THEREBY DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO DISPROVE AN ELEMENT OF THE GOVERNMENT'S CASE	10
1. THE INSANITY DEFENSE REFORM ACT OF 1984	13
2. THE LEGISLATIVE HISTORY	15
C. AFTER RULING THAT THE TRIAL JUDGE HAD MISREAD CONGRESS'S INTENT, THE COURT OF APPEALS SANCTIONED THE JUDGE'S ERROR BY RULING, CONTRARY TO ITS STATUTORY RULING AND WITHOUT APPARENT	

TABLE OF CONTENTS—*(Continued)*

Page

FOUNDATION, THAT THE REQUESTED INSTRUCTION WAS CORRECTLY EXCLUDED .. 20

CONCLUSION 24

APPENDIX:

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING *IN BANC* DATED SEPTEMBER 21, 1987..... A-1

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION FOR ACQUITTAL, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL DATED AUGUST 25, 1987..... A-2

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AUGUST 25, 1987..... A-3

ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED MARCH 27, 1986 .... A-45

TABLE OF AUTHORITIES

CASES: Page

Chambers v. Mississippi, 410 U.S. 284 (1973) 11, 15

Commonwealth v. Walzack, 468 Pa. 210, 360 A.2d 914 (1976) 11

Hughes v. Matthews, 576 F.2d 1250 (7th Cir.), *cert. dismissed sub. nom. Israel v. Hughes*, 439 U.S. 801 (1978) 11

In re Winship, 397 U.S. 358 (1970) 10, 11, 13, 23, 24

Martin v. Ohio, ____ U.S. ____, 107 S.Ct. 1098 (1987) .. 10

Mullaney v. Wilbur, 421 U.S. 684 (1975) 10, 11

Rhodes v. United States, 282 F.2d 59 (4th Cir.), *cert. denied*, 364 U.S. 912 (1960) 11

United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) 11, 14, 15, 17

United States v. Bryers, 730 F.2d 571 (9th Cir. 1984).... 11

United States v. Erskine, 588 F.2d 722 (9th Cir. 1978)... 11

United States v. Fischbach and Moore, Inc., 750 F.2d 1183 (3d Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985)... 21

United States v. Frisbee, 623 F.Supp. 1217 (N.D. Cal. 1985) 11, 17, 22

United States v. Gold, Crim. No. 86-289 (D.D.C. June 8, 1987) 22

United States v. Hartfield, 513 F.2d 254 (9th Cir. 1975).. 11

United States v. Pohlot, 827 F.2d 889 (3d Cir. 1987)..... 4

United States v. Pohlot, No. 85-00354-01, slip.op. (E.D. Pa. March 27, 1986) 3, 12, 16, 17

Washington v. Texas, 388 U.S. 14 (1967)..... 11, 15

STATUTES:

18 U.S.C. §17..... 9, 10, 11, 12, 13, 14, 15, 17

TABLE OF AUTHORITIES—*(Continued)*

Page

18 U.S.C. §704(b) 9, 10, 15, 17, 18

28 U.S.C. §1254(1) 2

Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, Title II, §402(a), 98 Stat. 2057, §20, recodified at 18 U.S.C. §17 ..... 9, 13, 17, 19, 21, 24

OTHER AUTHORITIES:

Devitt & Blackmar, *Federal Jury Practice & Instructions* 11

Report of the Senate Judiciary Committee, S. Rep. No. 98-225, 98th Cong., 2d Sess. 229 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182..... 14, 16, 17

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reprinted in the Appendix to this Petition at App. 3-44. The case is officially reported at *United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987).

The order and opinion of the district court denying petitioner's motion for acquittal or in the alternative for a new trial, No. 85-00354-01, slip. op. (E.D.Pa. March 27, 1986), is reprinted in the Appendix to this Petition at App. 45-55.

JURISDICTION

The decision sought to be reviewed by Writ of Certiorari was rendered August 25, 1987. Title 28 U.S.C. §1254(1) is the statutory provision which confers jurisdiction on this Court to review the decision in question.

CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution reads as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On February 7, 1986, in the Eastern District of Pennsylvania, a jury found Stephen Pohlot ("petitioner") guilty of using interstate commerce facilities in the commission of murder-for-hire, in violation of 18 U.S.C. §1952A (Counts Three, Five, Six, Eight and Ten). The jury also found petitioner guilty of conspiring to violate 18 U.S.C. §1952A (Count One). (Petitioner's "co-conspirator" was charged in the joint indictment in Counts Two, Four, Seven, and Nine.) On March 27, 1986, petitioner moved for acquittal or in the alternative for a new trial, on the grounds, *inter alia*, that the judge had incorrectly refused to instruct the jury that psychiatric evidence of petitioner's behavioral history and his mental condition at the time of the crimes charged could be considered by the jury in its determination of whether petitioner possessed the specific intent required under

Section 1952A. The judge denied all of petitioner's motions. *United States v. Pohlot*, No. 85-00354-01, slip. op. (E.D.Pa. March 27, 1986) (Petitioner's Appendix 45-55). On April 7, 1986, petitioner was sentenced, on Count One, to five years' imprisonment and a fine of $10,000; on Count Three, to five years' imprisonment, to run consecutively to the sentence on Count One, and a fine of $10,000; and on Count Five, to five years' imprisonment, to run consecutively to Counts One and Three, and a fine of $10,000. Petitioner was also sentenced to five years' probation on Counts Six, Eight and Ten, to run concurrently with each other but consecutively to Counts One, Three, and Five. Petitioner was also ordered by the court to pay restitution of $27,000 to Elizabeth Pohlot and to pay a special assessment of $50.00 on each of Counts One, Three, Five, Six, Eight, and Ten, for a total of $300.00.

Petitioner filed a Notice of Appeal in the United States Court of Appeals for the Third Circuit on April 7, 1986. On August 25, 1987, the court of appeals affirmed the district court's judgment and commitment order in a forty-two page opinion, reprinted at App. 3-44. On September 21, 1987, the court of appeals denied petitioner's petition for rehearing *in banc*.

II. FACTUAL HISTORY

The evidence at trial is summarized in the opinion of the court of appeals (App. 6-14). At the time of the events charged in the indictment, from August 16, 1985 to September 9, 1985, petitioner was a pharmacist of high professional standing and outstanding community reputation in the northern New York City suburb of Katonah, in Westchester County, New York. He had been a pharmacist for approximately twenty-five years and was the principal stockholder of a large pharmacy in Katonah. Petitioner and his wife, Elizabeth, who were married in 1966, were the parents of four children; their family life, according to uncontradicted trial testimony, was marked since the time of the marriage by Mrs. Pohlot's generally bizarre behavior and by her frequent hysterical outbursts, some of them violent, others

frighteningly irrational. For example, Mrs. Pohlot broke petitioner's thumb by crashing a coffee pot down on it; deeply gouged his face by scratching him while he spoke on the telephone; threatened him with a hunting knife; and shot him in the stomach with a gun, requiring extended hospitalization. These were only some of the violent acts. Mrs. Pohlot also hit and beat petitioner frequently and often did not permit him to enter their bedroom, or even their house. At least in part because of Mrs. Pohlot's erratic and dangerous behavior, two of the Pohlot children, Stephen, Jr., and Kristian, developed severe psychiatric disorders from a very early age into their teens. As a kind of "therapy" for her children's illnesses, Mrs. Pohlot insisted on allowing the children, and particularly Stephen, Jr., to keep a remarkable number of pets of all shapes and sizes around — and quite often in — the house. These included sixty rabbits, six goats, tanks full of fish, tanks full of snakes, a pony, six indoor cats and nine outdoor cats, numerous ducks, dogs, and a variety of birds — approximately a hundred of them, including cockatoos, blue and gold Macaws, yellow beaked red wing parakeets, parrots, African gray parrots, and toucans. Petitioner testified at trial on the nature of his long-standing suffering caused by the astounding number and variety of animals his wife insisted on keeping:

> A major fact here is that I no longer had a say — I am sure I had a lot of say, but it didn't carry any weight in what went on in the house. My function then deteriorated to provide for her way of life and the childrens' way of life and I had a place to sleep.

Notwithstanding his wife's violently aggressive behavior and her peculiar lifestyle, petitioner's deep affection for her, which apparently continued unabated until the very end, caused him to be unable to make any decision — over a period of more than fifteen years — that would have ended what had obviously become a severely abnormal and acutely dangerous family situation. In response to incidents and events that would have compelled most people to take dramatic and decisive action to alter the circumstances of their life in a healthy direction, petitioner took no action at all. Instead, he strained to find

excuses for his wife's behavior, even to the point of excusing the violence directed at him personally. For example, when asked at trial what he had done in response to his wife's breaking his thumb with the coffee pot and gouging his face with her nails, petitioner responded: "I felt very bad, obviously, and sort of swallowed my pride and continued."

The picture that emerged from the trial testimony, and the picture defense counsel sought to present, was of a man who had endured a remarkable number and variety of violent attacks and shocking indignities. Time after time, as shown at the trial, petitioner reacted to these events by not reacting, by letting "bygones be bygones," and by concluding after each incident that it, like the others, was simply an "abberation."

Defense counsel called a psychiatrist, Dr. Gary Glass, who testified concerning petitioner's repeated failure to react to his wife's bizarre and dangerous behavior over a fifteen-year period, and who, after examining petitioner and compiling a thorough "psychological profile," observed that

> he has functioned in an impotent way in terms of his ability to control others. . . .

As Dr. Glass explained in his testimony, petitioner almost always refused to acknowledge the need to take decisive action at critical junctures in his life, or to take any action at all to disentangle himself from situations that had become burdensome, or even — as in the case of his marriage — dangerous. He was, in Dr. Glass's word, "impotent" as far as his ability to influence the lives of his wife and children was concerned. As a result he was, in a real sense, at a loss to control his own destiny. He had a history, as revealed in Dr. Glass's examination and as reported to the jury through Dr. Glass's testimony, of reacting to problematic circumstances by choosing a path of least resistance; as might be expected, the path he chose usually tended not to settle anything. Petitioner would make gestures in the direction of solving a problem, but nothing would be resolved.

After discussing petitioner's characteristic pattern of failing to respond appropriately — or effectively — to the problems of his life and marriage, Dr. Glass described the circumstances

leading up to petitioner's aborted "attempt" to have his wife killed. Petitioner's family situation had, from 1983 to 1985, become increasingly unsettled and even dangerous. First, Elizabeth shot him in the stomach; soon after, his father, whom Dr. Glass described as petitioner's "guiding light" and closest friend, died unexpectedly; over the next year, mainly during 1984 and 1985, the psychiatric illnesses of his children, always quite evident, became especially severe, as they reacted to the "chaos" that was, in Dr. Glass's words, "the rule between mom and dad in the Pohlot family". (Stephen, Jr., the eldest son, was diagnosed as anorexic-bulemic and suicidal; Kristian, the eldest daughter, was diagnosed as anorexic.) Elizabeth, characteristically for her, reacted to the chaos by seeking court orders prohibiting petitioner from seeing his children or living at home. Petitioner, also characteristically, reacted by simply letting events run their course — by doing nothing. Finally, in the spring of 1985, Elizabeth filed for divorce, the one thing petitioner dreaded most. The divorce papers were, in petitioner's words as spoken to Dr. Glass, "the end of my life." Dr. Glass explained petitioner's reaction to this latest crisis:

> It may be difficult for us to understand how somebody who had been tormented this way, who had been shot by his wife, still feels that when his relationship may be in danger of really ending, feels as if it is the end of his life. He becomes depressed. He takes to drinking quite heavily. He is unable to sleep. The children begin to show the effect of this. And things go on from there in which he meets with a friend, a business associate and the idea of "Helping you with your dilemma" begins to surface.

Dr. Glass testified that, after George Neustadt — an old acquaintance from Atlantic City — first proposed the murder to him, petitioner seemed confused about what Neustadt really meant. Somehow, he knew what was being discussed, "but he didn't know." Events went on from there. In Dr. Glass's words:

> . . . Things progressed until the behaviors I am sure you heard of where he did meet a gentleman at a motel in

Pennsylvania and transact a cash transaction for the purpose of "killing his wife."

Now, I say "killing his wife" — I will come back to that in a moment. Following that cash transaction, he feels a great relief, much as he did when he left school as a teenager and finally, took control, albeit in a somewhat pathological way of his life.

The cash transaction, as Dr. Glass explained it, was an end in itself for petitioner. He felt "exhilaration" over his action, over his having taken control, such as it was, of the situation. But, like other "solutions" to other problems, the cash transaction did not bring permanent relief:

He also felt uncomfortable and the exhilaration was very short-lived, but that was the event. I don't believe that there was anything — the issue there was taking control. That's what we are talking about, as a live issue for him was taking control and if you will pardon the analogy, this was almost like an orgasm event, this frustration, this tension, all of these terrible feelings had been building up for years and years and years, exacerbated in the last ten months, year and a half, perhaps, and he is feeling totally incompetent in dealing with any of this frustration, this rage and this terrible feeling of lack of control, which is perhaps the worst thing that someone like him can go through.

Finally, he takes a step to do something about it and it's like the sky opens up and the sun shines until he realizes, of course, that this is a problem and he tries his best and is fortunate to be able to undo it, but that is the climatic event for him, the transaction, not a murder. He felt in many ways — this may sound a little unusual, but I believe there is truth to it. He felt as if he would hire somebody to kill Betsy and after that happened, they would go home and live together and be happier. . . . I am firmly convinced he believes this, he thinks when all of this nonsense is over, they're going to get back together again

> and be happy. That strikes us all, myself included, as a little bit unusual. That is the kind of feeling.
>
> Another analogy I might use to this cash transaction, is similar to an adolescent who is jilted by their boyfriend or girlfriend and trying all sorts of behaviors to make it right and unable to do so and finally resorts to a carefully orchestrated suicide attempt where they perhaps take a dull knife or an overdose of what is presumed to be a safe medication — like aspirin.

As Dr. Glass described petitioner's state of mind during this period of being in contact with the men he hired, what started out as "exhilaration" soon turned into discomfort, uneasiness, and finally fear, that the men would actually finish what he had initiated. After the first meeting with Michael Selkow, the Federal Bureau of Investigation's (F.B.I.'s) informant, to whom petitioner paid $8,000 of the $25,000 price they had agreed to, petitioner, in Dr. Glass's words,

> began to feel a little bit guilty several hours later and played the idea over in his mind, as he has a tendency to do based on his personality and felt finally that it was something that simply could not happen and I don't know the exact date, but he called the individual and told him to call off the plans, that everything was off.

After calling off the scheme, petitioner was arrested by agents of the F.B.I. He was charged under 18 U.S.C. §1952A with using interstate commerce facilities in the commission of murder-for-hire. Strangely enough, shortly before petitioner had contacted the men with whom he ended up getting involved, the F.B.I. had hired and wired one of them. As a result, petitioner's involvement in the aborted scheme was recorded from its inception; the phone call in which he informed one of the men that he was no longer interested in the two mens' services was among the final calls taped.

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

The question presented by this Petition is a very simple and clear one: May a jury consider psychiatric testimony as to a criminal defendant's mental condition in deciding whether the government has met its burden of proving beyond a reasonable doubt that the defendant possessed the specific intent required by the crime charged? In ruling that the jury may not consider such testimony, the district court misread Congress's intent in enacting the Insanity Defense Reform Act of 1984, specifically 18 U.S.C. §17 and 18 U.S.C. §704(b). The primary effect of these two statutes was, quite simply, to eliminate the "diminished capacity" defense.[1] This affirmative defense, as will be shown below, has nothing whatever to do with a petitioner's attempt to disprove the specific intent element of the government's prima facie case.

In the present case, petitioner presented psychiatric testimony concerning his mental condition and behavior at the time of the crimes charged. If the court had properly instructed the jury that it could consider this testimony — together with other relevant testimony — in determining whether petitioner in fact possessed the specific intent required by Section 1952A, the jury would almost certainly not have found, beyond a reasonable doubt, that petitioner possessed such an intent. In fact, the testimony of Dr. Glass presents a compelling portrait of an exceptionally passive husband and father who, after years of extraordinary abuse and frightening violence at the hands of his wife, finally acted by (1) hiring two men to "kill" his wife, even though he never intended to have her killed, and (2) paying them a fraction of the agreed-upon price. And that is where the story ended. There was no "(3)". Almost immediately upon

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1. Section 17 also alters the burden of proof on a defendant. After the enactment of the statute a defendant must prove insanity by clear and convincing evidence. In addition, Section 17 requires that the mental disease or defect alleged as the factual basis for an insanity defense be "severe." Finally, section 704(b) outlaws "ultimate fact" testimony by psychiatric experts testifying in criminal cases.

making the payment, petitioner called the "murder-for-hire" off. Dr. Glass testified that petitioner, in fact, never intended to kill his wife, that he simply was not the kind of person who could have gone "that far," and that, judged in relation to his inability to extricate himself from his horrific marriage any earlier in the course of its nineteen years, his decision to hire a killer was an end in itself. In Dr. Glass's words, petitioner felt "exhilirated" by that decision alone — by having made any decision — and had no further need of the hired killers' services. So he called them off, only to learn that the three conversations he had with the "hit-men" had been taped by the F.B.I.

In failing and refusing to instruct the jury that it could consider Dr. Glass's testimony on the specific intent issue, the district court permitted the jury to assume that petitioner's acts constituted evidence that he actually intended to go through with the plan — that he actually intended to have his wife killed. As Dr. Glass's testimony indicates, however, petitioner's psychological and behavioral history argues strongly against such a conclusion.

B. THE TRIAL JUDGE, BY FAILING AND REFUSING TO INSTRUCT THE JURY THAT EXPERT PSYCHIATRIC TESTIMONY COULD BE CONSIDERED IN DECIDING WHETHER PETITIONER HARBORED THE REQUIRED SPECIFIC INTENT, MISREAD CONGRESS'S INTENT IN ENACTING 18 U.S.C. §17 AND 18 U.S.C. §704(b), AND THEREBY DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO DISPROVE AN ESSENTIAL ELEMENT OF THE GOVERNMENT'S CASE

In any criminal case, the government bears the burden of proving beyond a reasonable doubt the separate elements necessary for a jury to find the defendant guilty of the crime charged. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358, 364 (1970); *see also Martin v. Ohio*, ____ U.S. ____, 107 S.Ct. 1098 (1987). Among these elements, in virtually all crimes, is a mental element. This mental element,

or mens rea, is an essential element of a crime and must be proved by the government beyond a reasonable doubt. *Mullaney v. Wilbur*, *supra*; *In re Winship*, *supra*. Moreover, the vast weight of authority in both federal and state courts has long held that psychiatric testimony is admissible for the purpose of disproving the specific intent element of the crime charged. *United States v. Brawner*, 471 F.2d 969 (D.C.Cir. 1972); *Hughes v. Mathews*, 576 F.2d 1250 (7th Cir.), *cert. dismissed sub nom. Israel v. Hughes*, 439 U.S. 801 (1978); *Rhodes v. United States*, 282 F.2d 59, 60 (4th Cir.), *cert. denied*, 364 U.S. 912 (1960); *see Washington v. Texas*, 388 U.S. 14, 17-18, 23 (1967) (Harlan, J., concurring); *United States v. Erskine*, 588 F.2d 721, 722 (9th Cir. 1978); *but see United States v. Bryers*, 730 F.2d 571 (9th Cir. 1984) (holding that trial court may exclude such testimony if it would not "materially assist" the jury on the specific intent issue); *see also Chambers v. Mississippi*, 410 U.S. 284 (1973); *Commonwealth v. Walzack*, 468 Pa. 210, 360 A.2d 914 (1976).[2]

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2. It has also long been recognized that a person's intoxication at the time of a criminal act may negate the existence of a specific intent. *See, e.g.*, 1 Devitt & Blackmar, *Federal Jury Practice & Instructions*, sec. 14.19, and cases cited; *United States v. Hartfield*, 513 F.2d 254 (9th Cir. 1975); the same principle applies, *a fortiori*, to evidence of mental disorder. As the court held in *United States v. Erskine*, 588 F.2d 722 (9th Cir. 1978):

> If a defendant can rely on a state of severe intoxication to establish an inability to form a specific intent, he can also prove that he suffered from some other mental or physiological condition which blocked formation of the requisite intent. As [the court in *United States v. Brawner*, 153 U.S. App.D.C. 1, 471 F.2d 969, 999 (1972)] has stated:
>
> > Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state such that one defendant can properly argue that his voluntary drunkenness removed his capacity to form the specific intent but another defendant is inhibited from a submission of his contention that an abnormal mental condition, for which he was in no way responsible, negated his capacity to form a particular specific intent, even though the condition did not exonerate him from all criminal responsibility.
>
> The effect of such evidence is, of course, very different from proof of legal insanity. For instance, one who commits a specific intent crime but, due to mental disease, was incapable of forming the required specific

In the present case, an intent actually to have his wife murdered was an essential element of the crime with which petitioner was charged. *United States v. Pohlot*, No. 85-00354-01, slip op. (E.D.Pa. March 27, 1986) (App. 45). As such, the district court's failure and refusal to instruct the jury to consider psychiatric evidence presented by petitioner on the specific intent element offended petitioner's right to present evidence in his defense and to be convicted only upon proof, beyond a reasonable doubt, of this essential element. The jury was not instructed — and the court expressly refused to instruct it — that psychiatric testimony could be considered on the issue of whether petitioner possessed the specific intent required by 18 U.S.C. §1952A. The court framed the issue as follows:

> . . .defendant contends that if the jury does not find him guilty by reason of insanity, it may nevertheless consider the psychiatric evidence offered in the affirmative defense in determining whether or not defendant had the necessary intent or mens rea to commit the offense charged. *Thus it appears that defendant is asserting a diminished capacity defense*. I refused to make such a charge to the jury.

Id. (App. 51-52) (emphasis added.) The court assumed that petitioner, in attempting to show that he did not possess the requisite specific intent, was asserting the diminished capacity defense, and that he was prevented from doing so by 18 U.S.C. §17. *Id.* The court's assumption was wrong in two respects: first, because it confused petitioner's attempt to disprove an element of the government's case-in-chief with an attempt to assert an affirmative defense in response to the government's case-in-chief; and second, because 18 U.S.C. §17, while it does outlaw the "diminished capacity" defense, does not say anything about a defendant's attempt to disprove an element of the government's case by presenting psychiatric testimony showing that

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NOTES (*Continued*)

intent, is not guilty of the crime. This is not actually a "defense", it is a way of disproving part of the Government's case. Insanity, on the other hand, should logically be held to be an affirmative defense with the burden of proof on the defendant.

one such element — specifically the required mens rea — could not have been present. By not instructing the jury as to the clear and immensely significant difference between "diminished capacity" and "lack of specific intent," the court almost certainly caused the jury to assume that because petitioner had failed to establish that he was legally insane — the burden of proof for which is extremely difficult to carry — it was prohibited from considering all testimony relating to his mental condition as to any other matter raised at trial. By thus failing to instruct the jury, and by demonstrating its own confusion about this critical aspect of criminal law in its opinion on petitioner's motions, the court allowed the jury to be guided in its deliberations by mistaken law. The district court thus committed reversible error.[3]

1. THE INSANITY DEFENSE REFORM ACT OF 1984

Congress enacted the Insanity Defense Reform Act of 1984, Pub.L.No. 98-473, §402(a), 98 Stat. 2057, §20, recodified at 18 U.S.C. §17, in response to its perception that the insanity defense was, in effect, excusing otherwise criminal conduct by making it too easy for criminals to establish their innocence by reason of insanity. In the introduction to the legislative history of the Act, the following purposes are listed as informing the Act's provisions:

> The legislation includes a definition of the insanity defense that will substantially narrow the definition, which has

3. By thus misleading the jury, the district court deprived petitioner of a jury verdict which properly reflected the constitutional prescription that the government bears the burden of proving every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-364 (1970). In fact, the jury instruction given by the district court made the government's job easier in that the jury considered the government's contention that petitioner harbored such an intent without also considering petitioner's argument, presented as to its psychological implications by his expert psychiatric witness, that the acts described by the government, though recounted accurately, did not reflect an intent on petitioner's part to have his wife murdered. As such, the trial court's incorrect ruling on the requested jury instruction had the effect of severely vitiating the petitioner's case.

> evolved from case law, presently applied in the Federal system. [It] also provides that the defendant shall have the burden of proving the insanity defense by clear and convincing evidence and prohibits expert opinion testimony on the ultimate legal issue of whether the defendant was insane. . . .

S.Rep. No. 225, 98th Cong., 2d Sess. 229, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3404. Thus, in drafting the legislation, Congress narrowed the scope of the federal common law definition of legal insanity, specifically the widely followed standard announced by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Brawner*, 471 F.2d 969 (D.C.Cir. 1972).[4] Congress accomplished this aspect of its objective by drafting the following language in Section 17, which simply redefines the insanity defense announced by the Court in *Brawner*:

> (a) AFFIRMATIVE DEFENSE. — It is an affirmative defense to a prosecution under any Federal Statute, that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
>
> (b) BURDEN OF PROOF. — The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

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4. In *Brawner*, the court of appeals devised a two-prong, either-or test for courts to apply in deciding whether a defendant was legally insane. Under this test, a defendant was insane — and thus not criminally culpable — if (1) he could present evidence that his "behavioral controls" were impaired to such an extent that "he lacked substantial capacity to conform his conduct to the law", or (2) he lacked "substantial capacity to appreciate that his conduct is wrongful." 471 F.2d at 991. The first of these tests was known as the "volitional" test of criminal insanity, the second as the "cognitive" test. 18 U.S.C. §17 eliminated the "volitional"-test.

The new statute raised the persuasive burden on defendants seeking to establish their innocence by reason of insanity. Whereas under the *Brawner* standard a defendant had to show that because of mental disease or defect he could not *either* (a) conform his conduct to the constraints of the criminal law, *or* (b) appreciate that his conduct was wrongful, under the new standard of 18 U.S.C. §17 a defendant is limited to offering proof relating only to the second portion of the *Brawner* test. That is, under the new legislation a defendant cannot offer proof, as he could under *Brawner*, that because of some mental disease or defect he was unable to control his criminal behavior; a defendant may, however, still offer proof that because of some severe mental disease or defect he was not able to appreciate that his conduct was wrongful. The new standard thus attempts to limit the previously widespread availability of the insanity defense in the federal courts.[5]

2. THE LEGISLATIVE HISTORY

Congress's purpose in enacting the new statute, apart from altering the burden of proof on defendants, was to limit severely the occasions when mental disease or defect will be allowed to excuse a criminal offense. In other words, Congress's intent was to eliminate the possibility that defendants, under authority of *United States v. Brawner*, *supra*, would be able to excuse their criminal behavior by asserting "loss of control" or "diminished capacity" as an affirmative defense. Thus, Section 17 was designed by Congress to leave only a defendant's failure to "appreciate . . . the wrongfulness of his acts," 18 U.S.C. §17, as

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5. Section 17 was designed, generally speaking, to make it more difficult for defendants to gain an acquittal by reason of insanity. But neither 18 U.S.C. §17 nor 18 U.S.C. §704(b) made a defendant's job more difficult by erecting barriers to the submission of competent evidence relating to his ability to form the specific intent required by the crime charged. Indeed, it is plain that for Congress to have erected such a barrier would have been unconstitutional, inasmuch as the Constitution entitles defendants to introduce evidence to disprove any element of the government's case-in-chief. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *see Washington v. Texas*, 388 U.S. 14, 17-18, 23 (1967) (Harlan, J., concurring).

a valid excuse to criminal activity. The district court below, in ruling on defense counsel's request that the jury be instructed that it could consider testimony of the defendant's mental state in considering the existence of specific intent, clearly read Section 17, and specifically the last sentence of Section 17(a), as disallowing expert testimony on specific intent. In the words of the court, "Congress has taken the view that mental conditions relating to an abnormality or defect is an 'all or nothing' defense, that is to say, either the defendant must be able to establish insanity pursuant to the statute otherwise psychiatric abnormalities or defects are not relevant." *United States v. Pohlot*, No. 85-00345-01, slip op. (E.D.Pa. March 27, 1986) (App. 53).

Although it did not actually explain the basis for its conclusion, the district court presumably focused on the final sentence of Section 17(a) in deciding that psychiatric testimony could only be used to support the new affirmative insanity defense, and that otherwise it is barred. That final sentence reads: "Mental disease or defect does not otherwise constitute a defense." Even apart from the fact that the context in which the sentence was written clearly suggests that by "a defense" Congress surely meant "an *affirmative* defense," the legislative history shows that Section 17 was drafted by Congress only to modify the *affirmative* insanity defense, and not to bar evidence tending to negate the government's prima facie case. In explaining the purpose of Section 17, Senate Report 225 reads as follows:

> The Committee also included language in section 20 [now section 17] explicitly providing that mental disease or defect other than that which renders the defendant unable to appreciate the nature and quality or wrongfulness of his acts does not constitute a defense. This is intended to insure that the insanity defense is not improperly resurrected in the guise of showing some other *affirmative defense*, such as that the defendant had a "diminished responsibility" or some similarly asserted state of mind which would serve to *excuse* the offense and open the door, once again, to needlessly confusing psychiatric testimony.

S.Rep. No. 225, 98th Cong., 2d Sess. 229, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3411 (emphases added). Congress's purpose was to outlaw "some other affirmative defense," including the irresistible impulse defense, the lack of control defense, or, as it is most commonly named, the diminished capacity defense. As the court in *United States v. Frisbee*, 623 F.Supp. 1217 (N.D.Cal. 1985) noted, Congress intended to alter the law, in drafting Section 17, only within the context of a defendant's presentation of evidence seeking affirmatively to rebut the prosecution's entire case. Yet the district court concluded that Congress decided that, outside of a full-blown insanity defense, "psychiatric abnormalities or defects are not relevant." *United States v. Pohlot*, No. 85-00345-01, slip. op. (E.D.Pa. March 27, 1986) (App. 53). Whether this argument is correct depends on what the court meant by the phrase "psychiatric abnormalities are not relevant." If the court meant that expert psychiatric testimony may not be presented by a defendant on the ultimate legal or factual issue of whether defendant acted with the requisite specific intent, it is correct. If, on the other hand, the court meant that expert psychiatric testimony about the defendant's mental condition, including its history, nature, severity, and effects, cannot be considered by the jury so that it may make a properly informed decision about whether a required specific intent was present, it is demonstrably wrong.

Congress, in enacting the Insanity Defense Reform Act of 1984, addressed the issue of psychiatric testimony in two ways. First, in 18 U.S.C. §17, it adopted the "cognitive" portion of the *Brawner* standard as the sole test of legal insanity in the federal courts, and made it an affirmative defense, as to which the defendant has the burden of proof.

Second, Congress amended Rule 704 of the Federal Rules of Evidence to regulate — and restrict — the form of psychiatric testimony in criminal cases; to the general rule that opinion evidence may embrace an ultimate issue (subd. (a)), the 1984 Act appended the followed exception:

> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state

> an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime or of a defense thereto. Such ultimate issues are for the 'trier of fact' alone.

It is plain that Congress expected expert testimony on a criminal defendant's past mental condition to continue to be admissible.[6] The rule implicitly recognizes the right to present such evidence, whether the evidence is intended as part of an insanity defense, or, as in the present case, as evidence tending to negate the existence of a required element of the crime. As the following legislative history makes clear, the intent of Rule 704(b) is to allow experts, including psychiatrists, to describe the nature, history, severity and effects of a defendant's mental illness, but to prevent them from stating a conclusion on the ultimate legal issue, e.g., that the defendant did not have the specific intent required. Congress sought to prevent experts from expressing *legal*, as opposed to *medical*, conclusions. The Senate Report states Congress's purpose in adding Rule 704(b):

> The purpose of this amendment is to eliminate the confusing spectacle of competing expert witnesses testifying to directly contrary conclusions as to the ultimate legal issue to be found by the trier of fact. Under this proposal, expert psychiatric testimony would be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been.

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6. Rule 704(b) of the Federal Rules of Evidence refers to an "expert witness testifying to the mental state or condition of a defendant in a criminal case." The Rule does not bar such testimony or restrict it to cases of insanity; it merely bars the expert from giving an opinion on the "ultimate issue" of "whether the defendant did or did not have the mental state or condition constituting an element of the crime charged." The Senate Report states that the intent of Rule 704(b) is to permit expert psychiatric witnesses to present and explain their diagnoses of the defendant's mental disease or defect. S.Rep. No. 225, 98th Cong., 2d Sess. 229, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3404, 3412. The Report also makes it explicit that this rule "extends beyond the insanity defense to any ultimate mental state of the defendant that is relevant . . . e.g., premeditation in a homicide case." *Id.* at 3413.

The basis for this limitation on expert testimony in insanity cases is ably stated by the American Psychiatric Association:

> It is clear that psychiatrists are experts in medicine, not the law. As such it is clear that the psychiatrist's first obligation and expertise in the courtroom is to "do psychiatry," i.e., *to present medical information and opinion about the defendant's mental state and motivation and to explain in detail the reason for his medical-psychiatric conclusions*. When, however, "ultimate issue" questions are formulated by the law and put to the expert witness who must then say "yea" or "nay," then . . . [h]e no longer addresses himself to medical concepts but instead [to] legal or moral constructs such as free will. . . .
>
> *Psychiatrists, of course, must be permitted to testify fully about the defendant's diagnosis, mental state and motivation (in clinical and common sense terms) at the time of the alleged act so as to permit the jury or judge to reach the ultimate conclusion about which they and only they are expert*. . . .
>
> Moreover, the rationale for precluding ultimate psychiatric testimony extends beyond the insanity defense to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proved. The Committee has fashioned its Rule 704 provision to reach all such "ultimate" issues, e.g., *premeditation in a homicide case*, or lack of predisposition in entrapment.

S.Rep. No. 225, 98th Cong., 2d Sess. 229, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3404 at 3412-3413 (emphases added). This legislative history makes it clear that Congress did not intend to prevent psychiatrists' opinions or testimony about a defendant's past mental state or behavorial patterns from being considered by a jury. Rather, in enacting the Insanity Defense Reform Act of 1984, Congress implicitly recognized both the usefulness and relevance of expert psychiatric testimony in the jury's task of determining the defendant's

mental condition at the time of the crime charged. It has limited such testimony only to the extent of barring essentially legal conclusions, and by prohibiting opinions as to the presence or absence of an "ultimate fact."

C. THE COURT OF APPEALS MISREAD CONGRESS'S INTENT BY RULING THAT THE INSANITY DEFENSE REFORM ACT DISALLOWED THE REQUESTED JURY INSTRUCTION

The court of appeals ruled that the district court was correct in refusing to instruct the jury—as per petitioner's request—that it could consider psychiatric testimony as to petitioner's mental condition in deciding whether the government had met its burden of proving beyond a reasonable doubt that petitioner possessed the specific intent required by 18 U.S.C. §1952A. While the court concluded, after an exhaustive analysis (App. 17-28), that Congress intended only to ban the "diminished responsibility" defense, and did not mean to ban testimony tending to rebut the government's proof of the existence of an element of the crime charged—including specific intent—the court nevertheless concluded that Congress's prohibition against diminished responsibility effectively amounted to a ban on psychiatric testimony tending to rebut the government's proof of a required mental state. This conclusion was erroneous.

On the sole question presented on appeal, which concerned the trial court's failure to instruct the jury that it could consider psychiatric testimony in deciding whether the government had proved that petitioner possessed the mental state required by 18 U.S.C. §1952A, the court ruled as follows:

> Pohlot's request for the jury to consider evidence of mental abnormality other than in the context of insanity . . . amounted to a request for a diminished responsibility defense that congress has abolished.

(App. 5-6) This conclusion was incorrect in its characterization of petitioner's request, since petitioner did not request a "diminished responsibility" instruction. Rather, he merely sought an instruction that the jury should consider psychiatric testimony in

determining whether the government had proven that petitioner possessed the specific intent required by 18 U.S.C. §1952A. Significantly, as the court demonstrated in its comprehensive review of the Insanity Defense Reform Act, these two instructions are entirely distinct and Congress meant only to ban the former, i.e., evidence of diminished responsibility. Congress did not intend to ban psychiatric testimony tending to rebut an element—including mens rea—of the government's case-in-chief.

The court of appeals understood from the start that the issue was whether the psychiatric testimony was admissible to rebut the government's proof of the required mental state:

> Although the issue is a close one, we conclude that the instructions as a whole had the probable effect of excluding evidence of Pohlot's mental abnormality from the jury's consideration of mens rea. If this evidence was admissible to prove a lack of mens rea, the court's instruction 'was capable of confusing and thereby misleading the jury.' *United States v. Fischbach and Moore, Inc.*, 750 F.2d 1183, 1195 (3d Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985).

(App. 17) The court defined its task as determining "whether . . . exclusion [of psychiatric testimony tending to negate the specific intent element] was proper" (App. 17). Thus, the sole question the court addressed was whether the psychiatric evidence offered by petitioner could be included in the jury's consideration of mens rea. This was not a diminished responsibility issue.

In affirming the district court's refusal to permit the jury to consider psychiatric testimony in deciding whether petitioner possessed the requisite mental state, and despite (1) its obvious recognition of the critical difference between evidence of diminished responsibility and evidence showing lack of mens rea, and (2) its express conclusion that Congress intended only to ban the former, and not the latter, the court incorrectly concluded that the testimony was inadmissible. In doing so, the court simply lumped diminished responsibility and a lack of the required mental state together, thereby confusing the issue and sanctioning *and repeating* the district court's confusing and misleading

jury charge. The court thereby failed to give effect to the distinction Congress intended to draw, in drafting the Insanity Reform Act, between a defense premised on diminished responsibility—which Congress meant to prohibit—and one premised on lack of mens rea—which it meant to preserve. The court of appeals crafted a meticulous statement of Congress's intent, and then, inexplicably, proceeded to ignore its own teachings and the will of Congress by affirming the district court's mistaken refusal to admit the testimony for the purpose for which it was offered.

In the second section of its opinion, the court of appeals addressed the threshold question of whether "the district court actually preclude[d] evidence on the issue of mens rea" (App. 14-17). The court concluded that "although the issue is a close one, we concluded that the instructions as a whole had the probable effect of excluding evidence of Pohlot's mental abnormality from the jury's consideration of mens rea" (App. 17).

Having concluded that the district court's instructions to the jury did, in all likelihood, cause the jury to fail to consider evidence of petitioner's mental abnormality in its deliberations as to the presence of the required mental state, the court examined the Insanity Reform Act to determine whether Congress intended such a result. Remarkably, in light of its ultimate ruling, the court concluded that Congress did not intend such a result:

> Both the wording of the statute and the legislative history leave no doubt that Congress intended . . . to bar only alternative "affirmative defenses" that "excuse" misconduct *not evidence that disproves an element of the crime itself*. *See United States v. Gold*, Crim. No. 86-289 (D.D.C. June 8, 1987) (insanity act does not bar psychiatric evidence on issue of mens rea); *United States v. Frisbee*, 623 F.Supp. 1217 (N.D. Cal. 1985) (same).

(App. 20) (emphasis added).

Notwithstanding its twin conclusions that (1) Congress did not mean to bar psychiatric testimony tending to negate the government's proof concerning a required mental state (App.

20); and (2) the district court instructed the jury to disregard psychiatric testimony offered by petitioner which tended to negate the government's proof concerning the specific intent element required by 18 U.S.C. §1952A (App. 17), the appellate court ruled that the district court did not err in thus instructing the jury. This conclusion is indefensible in light of the Insanity Reform Act; it is also indefensible in light of the court's own analysis of the Act. *As the court made clear, Pohlot did not request an instruction implicating the "diminished responsibility" defense, which, as the panel concluded, is all the Act sought to bar. Instead, he requested the district court to instruct the jury to consider his mental abnormality only in terms of the mens rea issue—which, as the court concluded, Congress did not intend to prohibit.* This incongruous result is simply untenable. This Court should clarify the meaning of the Insanity Defense Reform Act by ruling that the district court was mistaken in reading the Act to prohibit petitioner's requested instruction on the mens rea issue.

The importance of this issue cannot be overstated. The court of appeals' decision below, while expressly distinguishing between a defense premised on diminished responsibility (which Congress outlawed) and one premised on lack of specific intent (which Congress preserved), failed to carry out the implications of this distinction, thereby effectively obliterating it. With the court's decision as support, and contrary to the Insanity Defense Reform Act as the court itself construed it, trial courts will be left with no choice but to exclude psychiatric testimony tending to disprove an element of the government's case-in-chief. This result is not only contrary to the will of Congress; it is, as the court of appeals itself pointed out, also contrary to the spirit of *In re Winship*, 397 U.S. 355, 363-364 (1970), in which this Court held that due process requires that the government must prove every element of a criminal offense beyond a reasonable doubt. As the court of appeals stated:

> The defendant's right to present a defense to one of [the elements of a criminal offense] generally includes the right

> to the admission of competent, reliable, exculpatory evidence, and the Supreme Court has struck down "arbitrary rules that prevent whole categories of defense witnesses from testifying."

(App. 29) The effect of the court's decision, as the court itself seemed to recognize, will almost certainly be the exclusion of precisely the kind of testimony this Court had in mind in deciding *Winship* and which Congress undoubtedly meant to preserve in the Insanity Defense Reform Act.

CONCLUSION

It is clear that the district court misread Congress's intent in enacting the Insanity Defense Reform Act of 1984, and that the court of appeals sanctioned this misreading by affirming the district court's opinion. The district court should have instructed the jury that it was permitted to consider expert psychiatric testimony as to the defendant's mental condition in its determination of whether the government had met its burden of proving that the defendant had the specific intent to commit the crime charged. By not so instructing the jury, the district court deprived petitioner of a fair trial and committed plain constitutional error.

Based on the arguments and authorities cited herein, petitioner, Stephen Pohlot, respectfully requests this Honorable Court to grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, and reverse that court's decision.

Respectfully submitted,

/s/ James J. Rohn

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Dated: November 20, 1987

APPENDIX

Appendix 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1222

STEPHEN POHLOT,

Appellant

v.

UNITED STATES OF AMERICA

SUR PETITION FOR REHEARING IN BANC

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, MANSMANN, and GREENBERG, *Circuit Judges* and DUMBAULD, *District Judge**

The petition for rehearing filed by appellant, Stephen Pohlot, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

Judge Gibbons would grant rehearing.

BY THE COURT:

Circuit Judge

DATED: September 21, 1987

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* The Honorable Edward Dumbauld, United States District Judge for the Western District of Pennsylvania, as to panel rehearing only.

Appendix 2

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1222

UNITED STATES OF AMERICA

vs.

POHLOT, STEVEN,

Appellant

(D.C. Criminal 85-00354-01)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HIGGINBOTHAM and BECKER, *Circuit Judges*, and DUMBAULD, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel December 18, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court April 7, 1986 be, and the same is hereby affirmed.

ATTEST:

CLERK

August 25, 1987

Certified as a true copy and issued in lieu of a formal mandate on September 29, 1987.

Test:

Chief Deputy Clerk, United States Court of Appeals, for the Third Circuit.

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* The Hon. Edward Dumbauld, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Appendix 3

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1222

UNITED STATES OF AMERICA,

Appellee

v.

POHLOT, STEVEN,

Appellant

On Appeal From the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Criminal No. 85-00354-01)

Argued December 18, 1986

Before: HIGGINBOTHAM, BECKER,
Circuit Judges
and DUMBAULD, *District Judge*•

(Filed August 25, 1987)

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• The Honorable Edward Dumbauld, United States District Judge for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This bizarre case requires us to determine what, if any, evidence of a criminal defendant's mental abnormality is admissible to prove the defendant's lack of specific intent to commit an offense, following the passage of the Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, Title II, § 402(a), 98 Stat. 2057, § 20, recodified at 18 U.S.C. § 17.

The government contends that such evidence is never admissible to negate specific intent because the Act restricts all such evidence to the jury's consideration of a defendant's legal sanity or insanity. We disagree with this broad contention. We conclude that although Congress intended § 17(a) to prohibit the defenses of diminished responsibility and

diminished capacity. Congress distinguished those defenses from the use of evidence of mental abnormality to negate specific intent or any other mens rea, which are elements of the offense. While the contours of the doctrines of diminished responsibility and diminished capacity are unclear, the defenses that Congress intended to preclude usually permit exoneration or mitigation of an offense because of a defendant's supposed psychiatric compulsion or inability or failure to engage in normal reflection; however, these matters do not strictly negate mens rea.

Despite our disagreement with the government's broad contention, we agree that the Congressional prohibition of diminished responsibility defenses requires courts to carefully scrutinize psychiatric defense theories bearing on mens rea. Psychiatrists are capable of supplying elastic descriptions of mental states that appear to but do not truly negate the legal requirements of mens rea. Presenting defense theories or psychiatric testimony to juries that do not truly negate mens rea may cause confusion about what the law requires.

In this case, we believe that the evidence provided by appellant Stephen Pohlot and effectively excluded by the district court from the jury's consideration of mens rea could not, even if believed, demonstrate that Pohlot lacked the specific intent to contract for the killing of his wife. By his own admission, Pohlot engaged in considerable planning and activity, and he finalized an agreement to have his wife murdered. While Pohlot may not psychologically have understood the full consequences of this activity -- and in one sense may not have wanted his wife to die -- the purpose of his activity was the hiring of someone to kill his wife. Pohlot's request for the jury to consider evidence of mental abnormality other than in the context of insanity therefore amounted to a request for a

diminished responsibility defense that Congress has abolished.

We therefore affirm the judgment of conviction.

I. *Factual and Procedural History*

The following evidence was adduced at trial. Until the summer of 1985, Stephen Pohlot was a successful pharmacist and private investor, living with his wife, Elizabeth, and three of their children in Katonah, New York. According to Pohlot, however, beyond this facade lay a strange set of relationships, dominated by his wife's abuse.

Pohlot testified, for example, that his wife had broken his thumb by crashing a coffee pot down on it; deeply gouged his face with her nails; threatened him with a hunting knife; shot him in the stomach; and often locked him out of their house and bedroom. Pohlot also blamed his wife for the psychiatric illnesses of two of his four children, who were seriously anorexic. Illustrating her behavior, Pohlot said that she had insisted on keeping an enormous number of pets in or about the house: sixty rabbits, six goats, tanks full of fish, tanks full of snakes, a pony, six indoor cats and nine outdoor cats, numerous ducks and dogs, and a variety of birds.

In the summer of 1985, Elizabeth obtained a court order removing Pohlot from their home. In July 1985, she filed for divorce, freezing Pohlot's assets. These events, according to the government, triggered the murder plot, which the government presented chiefly through the testimony of George Neustadt, a friend and business associate of Pohlot and Michael Selkow, the man Pohlot contacted to arrange the murder.

Shortly after Elizabeth filed for divorce, Pohlot told Neustadt that he was thinking of killing his wife. Pohlot said that he had hired a contract killer in Atlantic City, but that the killer had committed

suicide. Pohlot asked if Neustadt knew of anyone else in Atlantic City who could arrange the murder. Neustadt thought he might and agreed to try to contact him.

Neustadt then called Selkow, whom he had met at a casino and whom he suspected of having connections to organized crime. Unknown to Neustadt, Selkow had become a government informer. , Neustadt communicated the general purpose of his call, and they arranged to meet in Atlantic City. In Atlantic City, in a conversation tape-recorded by the F.B.I., Neustadt explained what Pohlot needed, and Selkow told Neustadt that he would bring a killer in from Italy. Neustadt relayed this representation to Pohlot.

Several days later, Pohlot phoned Selkow, and the two arranged to meet in Philadelphia. In the course of the meeting, which was also tape-recorded, Selkow asked Pohlot why he wanted to have his wife killed. Of relevance to the government's trial theory of financial motivation, Pohlot referred several times to the fact that Elizabeth was aware of money that he had stashed away (apparently in safe deposit boxes). He stated, for example:

> You know there's just, there's just no way . . . you know I uh implore her to, let's, let's talk about this. You know, don't, don't be a pig, don't expose any of them, them papers that are drawn, there's the x number of dollars in this box and x number of dollars in that box. And the day that come, that, that it comes, that they open these . . . boxes and they see this kind of money you know it's uh, [unintelligible] gonna be looking over here and, saying, let me have it.

Pohlot also made references to his wife "cheating," to her fabrication of charges of assault to gain the order barring him from their home, and to the problems of his children. Pohlot related the story of having talked to

an earlier close friend about killing his wife before the friend committed suicide.

Pohlot and Selkow agreed that Selkow would arrange the murder of Pohlot's wife for $25,000. Pohlot paid $8,000 immediately and then gave Selkow a description of his wife, her cars, and her routine. Pohlot described particularly his wife's appointments with her psychiatrist and the route she travelled to get there. He stressed that his wife's murder had to "appear to be an accident." Selkow explained the plan:

> [I]t'll be an accident, and it'll be en route to the shrink. Now what they're, what he's gonna do, this guy's an expert, comes in from Italy. . . . [H]e will be in after Thursday. (Pause) After that it'll take him about, less than a week.

Pohlot stated that "I would like the least amount of exposure," but stressed that he wanted "this thing" done by September 18, 1985 because that was the scheduled date of a court hearing on his wife's abuse allegations. Selkow briefed Pohlot on how to react to the investigations that would follow the killing. They arranged for Pohlot to pay Selkow after the murder by giving an envelope with cash to one of Neustadt's drivers.

Two weeks later, at the FBI's direction, Selkow notified Pohlot that the hitman had arrived. He told Pohlot to stay away from his wife. FBI agents then informed Selkow that they planned to arrest Pohlot and Neustadt and that they would relocate Selkow for his own protection. Selkow, however, was unwilling to "disappear in the middle of the night" because of unresolved personal matters. In an attempt to "buy time" by slowing down the progress of the Pohlot case, he contacted Neustadt and Pohlot and arranged to meet Pohlot at a rest station on the New Jersey Turnpike.

At the turnpike station, Selkow told Pohlot of doubts about the Italian hitman. He stated that he thought his telephone might be bugged. He instructed Pohlot to telephone him that night to call the murder off and thereby throw the authorities off the track. In response to a question from Pohlot, however, he assured Pohlot that the murder would still occur in a couple of weeks once Selkow was sure that they had "the right people."

That night, Pohlot did call Selkow and express his desire to cancel the murder. Selkow played the tape of this phone call to the FBI agents. But the FBI agents did not believe this call. They suspected that Selkow had planned it. They therefore arrested Pohlot and Neustadt the next day and eventually arrested Selkow on charges of obstruction of justice. Pohlot was indicted on five counts of using interstate commerce facilities, i.e., the telephone, in the commission of murder for hire and one count of conspiring to commit that offense. At trial, the government theorized that Pohlot intended to have his wife murdered because of concern that she knew where he had hidden assets from the IRS.

Pohlot disputed few of the government's factual assertions. He did, however, dispute the following. He disagreed that he had proposed the murder initially to Neustadt, contending instead that the idea had "evolved" out of numerous conversations. He also claimed that his statements about discussing his wife's murder earlier with a potential killer were lies. Most importantly, he claimed that Selkow never told him, in their meeting on the New Jersey Turnpike, to telephone and cancel the murder. Instead, Pohlot claimed that he finally "came to his senses," understood that a crime was going to be committed and decided to take action to prevent it.

These limited disagreements with the government

alone do not negate the thrust of the government's allegations. The district court instructed the jury, and Pohlot did not object, that even if Pohlot had truly decided on his own to abandon the murder after the New Jersey meeting, he would still be guilty if he had conspired and made telephone calls for the purpose of committing murder for hire. Instead, Pohlot's defense, based primarily on the affirmative defense of insanity, concentrated on claims that his entire experience had been a fantasy, representing an unrealistic attempt to overcome an inability to deal with his wife's abuse.

In the pursuit of this defense, Pohlot brought forth the many examples of abuse by his wife mentioned above. In the face of this abuse, Pohlot testified that he had shown a psychological inability to respond. For example, after his wife shot him, and after his resulting operation, Pohlot stated that he had spoken to his attorney in the hospital as follows:

> I said, 'What are my options?' He said, 'You can prosecute or you can waive prosecution.' I said, 'I have to waive prosecution. I am sure that was an aberration. That was an inadvertent incident and I am very much in love with my wife and I want to waive prosecution and I want her to stay home'"

As a result, Pohlot claimed:

> . . . I no longer had a say -- I am sure I had a lot of say but it didn't carry any weight in what went on in the house. My function then deteriorated to provide for her way of life and the children's way of life and I had a place to sleep.

This psychological inability to respond, Pohlot claimed, led to the murder plot as "a weak attempt to fight back." But Pohlot hatched the plot to fulfill psychological motivations, not truly to kill his wife. "It was a fantasy," he said.

Buttressing Pohlot's own statements, the defense presented the testimony of a psychiatrist, Dr. Gary Glass. On the basis of a series of meetings with Pohlot, but relying only on Pohlot's version of events, Dr. Glass diagnosed Pohlot as a "compulsive personality, passive dependent personality and passive aggressive personality." Pointing to various events in Pohlot's life history, Glass explained that Pohlot had characteristically shown an inability to assert himself and to gain control of his life. Unable to take decisive action or even to acknowledge problems to himself, "his only way of development so as to have control over his life . . . was to hurt himself." For example, to protest being sent to a different high school, "What he did was essentially to hand in blank papers in his third year until the school was forced into the position of calling his mother and throwing Stephen out of school . . . ."

According to Dr. Glass, this pattern of behavior continued into Pohlot's married life and explained Pohlot's inability to respond to his wife's abusive behavior. As his relationship with his wife became increasingly one of verbal and physical struggles, and as his children became sick, Pohlot became more and more disturbed. Then, the same year as the murder plot, the death of Pohlot's father inflicted an enormous shock. Finally, when his wife served him with divorce papers, Pohlot felt it "was the end of my life." Citing these facts, Dr. Glass presented the following understanding of Pohlot's mental state:

> He becomes depressed. He takes to drinking quite heavily. He is unable to sleep. . . . And things go on from there in which he meets with a friend, a business associate and the idea of, "Helping you with your dilemma" begins to surface.

Originally, there was some confusion as to whether or not Stephen really knew what that meant, at first, and then, I suspect there is knowing and there is knowing much like he did not know his wife was having several affairs. He did not really know until it was discussed in the context of psychiatric treatment. Here again he knew it, but he didn't know. Things progressed until the behaviors I am sure you heard of where he did meet a gentleman at a motel in Pennsylvania and transact[ed] a cash transaction for the purpose of, 'killing his wife.'

Now, I say, 'killing his wife' -- I will come back to that in a moment. Following that cash transaction, he feels a great relief, much as he did when he left school as a teenager and finally, took control, albeit in a somewhat pathological way of his life. . . .

He also felt uncomfortable and the exhilaration was very short lived, but that was the event. I don't believe that there was anything -- the issue there was taking control. . . . [A]ll of these terrible feelings had been building up for years and years . . . .

Finally, he takes a step to do something about it and it's like the sky opens up and the sun shines until he realized, of course, that this is a problem and he tries his best and is fortunate to be able to undo it, but that is the climactic event for him, the transaction, not a murder. He felt in many ways -- this may sound a little unusual, but I believe there is truth to it. He felt as if he would hire somebody to kill Betsy and after that happened, they would go home and live together and be happier. . . . [H]e thinks when all of this

> nonsense is over, they're going to get back together and be happy. . . .
>
> Another analogy I might use to this cash transaction, is similar to an adolescent who is jilted by their boy friend or girl friend and trying all sorts of behaviors to make it right and unable to do so and finally resorts to, a carefully orchestrated suicide attempt where they perhaps take a dull knife or an overdose of what is presumed to be a safe medication like aspirin.

At the close of trial, the court permitted Pohlot's counsel to argue to the jury that Pohlot's mental abnormality indicated a lack of mens rea. The district court then proceeded to instruct the jury, without objection, on the elements that the government must prove for the conspiracy count and for the counts of using interstate commerce for the commission of murder for hire.

Describing the necessary mental state, the court stated that for Pohlot to be guilty of conspiracy, he must have "willfully participated" in the conspiracy "with the intent to advance [sic] or some other object or purpose of the conspiracy." "To participate willfully means to act and participate voluntarily intentionally with specific intent to do something the law forbids . . . ." For Pohlot to be guilty of using interstate commerce in the commission of murder for hire, the court stated that Pohlot must have "intended that the murder of his wife be committed."

In considering whether Pohlot possessed the requisite mens rea, the court told the jury, "You may consider any statements made or done or admitted by the Defendant or all the other facts and circumstances and evidence which indicates his state of mind." The court rejected, however, Pohlot's proposed jury instruction that in determining whether the

government had met this burden, i.e., of proving specific intent, the jury "may consider the testimony as to the defendant's abnormal mental condition." The parties dispute whether other portions of the court's instruction effectively precluded the jury from considering evidence of mental abnormality on the specific intent issue.

The jury found Pohlot guilty of five counts of using interstate commerce facilities in the commission of a crime of violence, and one count of conspiring to do the same. Pohlot then moved for a judgment of acquittal or for a new trial on the grounds, inter alia, that the court had failed to instruct the jury that it could consider evidence of Pohlot's mental condition in deciding whether Pohlot possessed the requisite mens rea. The court rejected this motion on the grounds that Pohlot was "asserting a diminished capacity defense" that Congress had abolished in the Insanity Defense Reform Act. *United States v. Pohlot*, Crim. No. 85-00354-01, slip op. at 9-13 (E.D. Pa. March 27, 1986). Pohlot now appeals, presenting solely the mens rea issue.

II. *Did the District Court Actually Preclude Evidence on The Issue of Mens Rea?*

At the threshold, the government contends that we need not decide whether evidence of mental abnormality is admissible to prove lack of mens rea because the trial court did not actually preclude such a use. The government notes that the district court permitted Pohlot's counsel to argue to the jury that Dr. Glass's testimony indicated a lack of mens rea. And the government points to the court's general instruction that the jury could consider "all the . . . facts and circumstances and evidence which indicates [Pohlot's] state of mind." At one point, the district court even

acknowledged that Pohlot's "fantasy defense" was different from the insanity defense and appeared to instruct the jury to consider it:

> I think Mr. Pohlot's defense was that [driving away from the Trenton meeting] was the first time he came to realize what he was doing and withdrew as a result of becoming rational, I suppose, as opposed to being legally insane. However, that is a matter that you should consider.

Even assuming that evidence of abnormality was admissible to prove lack of mens rea, the government concludes, Pohlot received the jury instruction he was due, and he had no right to have the evidence of mental abnormality heightened with a particular instruction. *Cf. United States v. Castro*, 776 F.2d 1118 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1233 (1986) (failure to instruct jury to consider psychologist's testimony on defendant's susceptibility to entrapment does not constitute error where court did not instruct jury to ignore evidence).

Pohlot responds that the district court's jury instruction did effectively exclude the psychiatric evidence from the jury's consideration of mens rea. Pohlot also argues that even if the district court did not exclude the evidence, the court committed reversible error by failing to instruct the jury specifically to consider the psychiatric evidence in that context. Pohlot considers this case analogous to cases in which we have reversed trial courts for failing to instruct juries specifically that they may acquit on the basis of character or alibi evidence. *See United States v. Logan*, 717 F.2d 84 (3d Cir. 1984) (character evidence); *United States v. Frischling*, 160 F.2d 370,

370-71 (3d Cir. 1947) (same); *United States v. Booz*, 451 F.2d 719 (3d Cir. 1971), *cert. denied*, 414 U.S. 820 (1973) (alibi evidence).

We need not consider Pohlot's demand for a specific supporting instruction because we agree that the district court's instructions probably led the jury not to consider the psychiatric evidence on the issue of mens rea. We acknowledge the statements mentioned above suggesting the contrary. After describing the insanity defense, however, the court stated:

> Mental disease or defect does not otherwise constitute a defense. . . . A mental disease or defect, other than one which renders a Defendant unable to appreciate the nature or quality or wrongfulness of his acts, as I said, does not in itself constitute a defense. (834a)

If the court intended this statement only to mean that mental disease did not constitute any affirmative defense other than insanity, the instruction would not necessarily preclude the use of evidence of mental defect from the jury's consideration of the elements of the offense. See the discussion *infra* typescript at 18-21. The court followed this statement, however, with a discussion of the psychiatric evidence. Without any instruction to the contrary, therefore, this language suggests that evidence of mental abnormality was relevant only to the issue of insanity.

Later instructions were more specific. After the court had concluded its original instructions, counsel for both parties requested additional instructions on mens rea. Pohlot's counsel reiterated his request for an instruction that psychiatric evidence could prove lack of mens rea. The court rejected Pohlot's suggestion but provided additional instruction on mens rea:

> I believe if this was a mistake by the Defendant, and if you believe that somehow it was a mistake

> by the Defendant, that he did not understand, appreciate what was going on, [then] he didn't have the mens rea. If on the other hand, you think he did understand what was going on as defined, *when I say understand what was going on, I mean within the frdmework of his legal sanity or insanity, then the mens rea has been met.*

This instruction conflated the issues of mens rea and the issues of the insanity defense and suggested that the evidence of mental abnormality could prove only insanity.

Although the issue is a close one, we conclude that the instructions as a whole had the probable effect of excluding evidence of Pohlot's mental abnormality from the jury's consideration of mens rea. If this evidence was admissible to prove a lack of mens rea, the court's instruction "was capable of confusing and thereby misleading the jury." *United States v. Fischbach and Moore, Inc.*, 750 F.2d 1183, 1195 (3d Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985). We therefore proceed to a consideration of whether that exclusion was proper.

III. *Effect of the Insanity Defense Reform Act*

A.

In the Insanity Defense Reform Act of 1984, Congress provided a statutory formulation of the insanity defense for the first time:

> (a) **Affirmative defense.**--It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was

> unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
>
> (b) **Burden of proof.**-- The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

18 U.S.C. § 17. Through this section, Congress deleted the "volitional prong" of the commonly accepted Model Penal Code approach which had permitted acquittal if the defendant "as a result of mental disease or defect . . . lacks substantial capacity . . . to conform his conduct to the requirements of law." Model Penal Code § 4.01 (1962). Congress also shifted the burden of proof, requiring the defendant to prove insanity by clear and convincing evidence.

The government claims that, in addition to these changes, the Act also bars a defendant from using evidence of mental abnormality to negate mens rea. The government relies on the language stating that apart from insanity "mental disease or defect does not otherwise constitute a defense." The Report of the Senate Judiciary Committee explained that this language was:

> intended to insure that the insanity defense is not improperly resurrected in the guise of showing some other affirmative defense, *such as that the defendant had a 'diminished responsibility' or some similarly asserted state of mind* which would serve to excuse the offense and open the door, once again, to needlessly confusing psychiatric testimony.

S. Rep. No. 98-225, 98th Cong., 2d Sess. 229 (1984), *reprinted in* 1984 *U.S. Code Cong & Ad. News* 3182, 3411 (hereinafter *Senate Report*) (emphasis supplied).

In the government's view, a claim that a defendant

"lacked specific intent due to his mental abnormalities is tantamount to a 'diminished capacity' defense," which is in turn equivalent to a "diminished responsibility" defense. Government's Brief at 19. The government draws support from *Muench v. Israel*, 715 F.2d 1124, 1143 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2682 (1984), in which the court stated:

> [T]he courts have used the labels diminished responsibility, diminished capacity, and other nomenclature merely as a shorthand for the proposition that expert evidence of mental abnormalities is admissible on the question of whether the defendant in fact possessed a particular mental state which is an element of the charged offense. . . . When a court rejects the doctrine of diminished capacity, it is saying that psychiatric evidence is inadmissible on the mens rea issue.

Other courts have similarly referred to the use of expert psychiatric evidence to negate mens rea as a "diminished capacity" or "diminished responsibility" defense.[1] The government therefore reasons that § 17(a)'s prohibition of diminished responsibility defenses precludes Pohlot from using evidence of mental abnormality for the purpose he requested.[2]

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1. *See, e.g., Campbell v. Wainwright*, 738 F.2d 1573, 1580-81 (11th Cir. 1984); *United States v. Kepreos*, 759 F.2d 961, 964 n.4 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 1233 (1986); *State v. Wilcox*, 70 Ohio St. 2d 182, 436 N.E.2d 523, 524-25 (1982); *State v. Laffoon*, 125 Ariz. 484, 610 P.2d 1045, 1047 (1980).

2. These cases generally refer to "diminished capacity" defenses as the use of "expert psychiatric evidence" not the use of any evidence of mental abnormality to negate mens rea. Because the district court's instruction barred not just the testimony of Dr. Glass but also Pohlot's own testimony about his mental state, the government is asking for an even broader prohibition in this case.

Pohlot disagrees. He contends that the use of psychiatric evidence to negate mens rea is not a "diminished capacity" or "diminished responsibility" defense. As he views it, the Insanity Defense Reform Act only aims to preclude "affirmative defenses" based on mental disease, not the use of mental disease to negate an element of the offense. He therefore claims that the Act did not justify the district court's restriction of psychiatric evidence to the insanity defense.

B.

We first consider the government's claim that evidence of mental abnormality is never admissible to negate mens rea. We disagree. Both the wording of the statute and the legislative history leave no doubt that Congress intended, as the Senate Report stated, to bar only alternative "affirmative defenses" that "excuse" misconduct not evidence that disproves an element of the crime itself. *See United States v. Gold*, Crim. No. 86-289 (D.D.C. June 8, 1987) (insanity act does not bar psychiatric evidence on issue of mens rea); *United States v. Frisbee*, 623 F. Supp. 1217 (N.D. Cal. 1985) (same).

Pohlot essentially contends that "mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense." Model Penal Code, § 4.02(1) (1962). Although this principle has sometimes been phrased as a version of the "diminished capacity defense," it does not provide any grounds for acquittal not provided in the definition of the offense. Properly understood, it is therefore not a defense at all but merely a rule of evidence.[3] *See*

3. The distinction is analogous to the use of evidence of intoxication. As the Senate Report to the Insanity Defense Reform

Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 Colum. L. Rev. 827, 833 (1977); Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. Crim. L. & Criminology 1, 5-7 (1984). As several United States Courts of Appeals have therefore stressed, "[t]he use of expert testimony for this purpose is entirely distinct from the use of such testimony to relieve a defendant of criminal responsibility based on the insanity defense or one of its variants, such as diminished capacity." *United States v. Demma*, 523 F.2d 981, 986 n.14 (9th Cir. 1975); *see also United States v. Staggs*, 553 F.2d 1073, 1075 (7th Cir. 1977); *United States v. Bennett*, 539 F.2d 45, 53 (10th Cir. *cert. denied*, 429 U.S. 925 (1976); *United States v. Brawner*, 471 F.2d 969, 998-1002 (D.C. Cir. 1972); *Rhodes v. United States*, 282 F.2d 59, 60-61 (4th Cir. 1960), *cert. denied*, 364 U.S. 912 (1960).[4]

Staggs, 553 F.2d 1073, provides an example of how psychiatric evidence may help negate mens rea without raising an additional ground of defense. In that case, the defendant, Staggs, faced charges of aggravated assault on the claim of a policeman that the defendant had threatened to shoot if the policeman approached him. Staggs contradicted that testimony

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Act summarizes, "the voluntary use of alcohol" does not constitute any "species of a legally valid affirmative defense," but "intoxication may negate a state of mind required for the commission of the offense charged." *Senate Report* at 229 & n. 30

4. In a 1983 survey one commentator found that twenty-two states had recognized this use of psychiatric testimony. Note, *Diminished Capacity and Diminished Responsibility: Irrevocable Doctrines Confused in State v. Wilcox*, 14 Toledo L. Rev. 1399, 1403 n.33 (1983). Most states, however, limit psychiatric evidence to specific intent crimes on the theory that mental abnormality can virtually never disprove the mens rea required for general intent crimes so that psychiatric evidence would be misleading.

and sought to introduce the testimony of a psychiatrist that Staggs' mental state made him unlikely to threaten the policemen. Reversing the district court, the court of appeals ordered that the jury hear the proffered expert evidence.

Because admitting psychiatric evidence to negate mens does not constitute a defense but only negates an element of the offense, § 17(a) by its terms does not bar it. Section 17(a) states only that "mental disease . . . does not otherwise constitute a defense;" it does not purport to establish a rule of evidence.

C.

The legislative history supports this plain reading. Congress heard and relied on the testimony of leading academic commentators who related the distinctions between a strict mens rea approach and defenses of diminished responsibility or partially diminished capacity.[5] Citing one of these commentators, the House Judiciary Committee stated in a report to the House accompanying a bill that was substantially the

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5. For example, Congress heard the testimony and received into the record the articles of Professors Stephen Morse and Peter Arenella, who carefully distinguished between a lack of mens rea and diminished capacity. *See Insanity Defense in Federal Courts, Hearings Before the Subcommittee on Criminal Justice, House Judiciary Committee*, 97th Cong., 2d Sess. 117-18 (1982) (Serial No. 134) (hereinafter *1982 House Hearings*) (testimony of Prof. Arenella); *Reform of the Federal Insanity Defense, Hearings Before the Subcomm. on Criminal Justice, House Judiciary Committee*, 98th Cong., 1st Sess. 370-74 (1983) (Serial No. 21) (hereinafter *1983 House Hearings*) (testimony of Prof. Morse); *see also 1983 House Hearings* at 255 (Remarks of Rep. Conyers) (referring to Prof. Morse as "one who has helped us greatly"). In addition, other expert witnesses stressed the distinction between the use of evidence of mental abnormality to defeat mens rea and affirmative defenses excusing conduct because of insanity. *See, e.g., 1982 House Hearings* at 135-40 (testimony of Bruce Ennis on behalf of American Psychological Association).

same as the Senate bill which eventually became law:

> The use of mental disorder to negate mental state elements of crimes should not be confused with the 'diminished capacity' defense as developed by the California courts during the 1960's and 1970's. Under that doctrine, a defendant could escape responsibility for a crime by demonstrating not that he or she lacked a required specific intent, but rather that his or her capability of entertaining that intent was not, because of mental disorder, commensurate with that of nondisordered persons.

H.R. Rep. No. 98-577, 98th Cong. 1st Sess. 15 n.24 (1983) (hereinafter *House Report*) (*citing* Arenella, *supra*). Describing that provision of the bill prohibiting the creation of affirmative defenses, other than insanity, based on mental abnormality,[6] the Report explained:

> Since the current insanity defense is derived from case law, the Committee is concerned that additional defenses based on mental disorders could be developed by the courts in order to circumvent the tighter requirements developed by Congress. Thus, the bill provides that the Committee's test constitutes the only affirmative defense based on mental disorder that will be applicable in Federal courts. *Mental disorders will remain relevant, of course, to the issue of the existence of a mental state required for the offense, such as the specific intent required for*

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6. The reported house bill, No. 3336, reproduced in the report at 48, provided at Part I, Chapter 1, § 16(d):

> Except as provided in subsection (a) of this section, an abnormal mental condition does not constitute an affirmative defense to an offense against the United States.

> *certain crimes. This accords with current practice.*

House Report at 14 (emphasis supplied; footnote omitted).

The Senate similarly distinguished between diminished responsibility or diminished capacity defenses, particularly as recognized by California cases, and the use of evidence to negate mens rea. As Senator Orrin Hatch stated on the Senate floor:

> Some critics of the mens rea approach, confusing the issue of incapacity to harbor the requisite mens rea with the doctrine of "diminished responsibility" recognized in a line of California court decisions, contend that its adoption would result in a significant expansion of the scope of psychiatric testimony. Actually, the California doctrine bears little if any relevance to the issue of capacity to form criminal intent that may be relevant under the mens rea approach.

130 Cong. Rec. S418-19 (daily ed. Jan. 30, 1984).

In light of this awareness, the language of the Senate Report is instructive. The report states that § 17(a) was intended to insure only that evidence of mental disease will not resurrect the insanity defense "in the guise of showing some other *affirmative defense*." *Senate Report* at 229 (emphasis supplied). It also refers to "'*diminished responsibility*' or some similarly asserted state of mind which would serve to *excuse* the offense." *Id.* (emphasis supplied). These word choices indicate that the Senate Judiciary Committee wished to abolish only diminished responsibility and capacity defenses not to abolish the use of psychiatric evidence to disprove mens rea.[7]

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7. The Senate Report's discussion of the difference between affirmative defenses and the negation of mens rea in the context of

A later portion of the Senate Report confirms this view of the Committee's intent. In addition to changing the insanity defense, the Insanity Defense Reform Act altered Federal Rule of Evidence 704 to prevent psychiatric experts from providing opinions on ultimate issues. The Report explained: "The Committee has fashioned its Rule 704 provision to reach all such 'ultimate' issues, e.g., *premeditation in a homicide case*, or lack of predisposition in entrapment." *Id.* at 231 (emphasis supplied). Premeditation is, of course, an element of mens rea. If the Judiciary Committee had intended § 17(a) to prevent psychiatrists from testifying about mens rea at all, its report would almost certainly not have indicated its approval of psychiatric evidence on mens rea.[8]

We need not rely only on the language of § 17(a)

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intoxication, *see* note 3, *supra*, indicates that the Senate used the term "affirmative defense" in its precise meaning.

8. Significantly, Congress changed Federal Rule of Evidence 704, but not Federal Rule of Criminal Procedure 12.2. Rule 12.2(a) requires the defendant to notify the government about an intent to rely on an insanity defense. Rule 12.2(b) provides in addition:

> If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, . . ., notify the attorney for the government in writing of such intention . .

The Advisory Committee note states: "Rule 12.2 is designed to require a defendant to give notice prior to trial of his intention (1) to rely upon the defense of insanity or (2) *to introduce expert testimony of mental disease or defect on the theory that such mental condition is inconsistent with the mental state required for the offense charged.*" (emphasis supplied)

Congress' failure to amend Rule 12.2(b), despite the fact that many bills did propose changes in the rule, *see e.g.*, S.1558, S.2669 (97th Cong.), indicates that Congress expected psychiatric evidence to remain relevant to mens rea.

and on the House and Senate reports. The entire structure of the Congressional debate suggests that Congress did not intend to bar evidence of mental abnormality to prove a lack of mens rea. After a jury acquitted John S. Hinckley of attempting to kill President Reagan, there was widespread support in Congress, in the Administration and in medical and legal professional organizations for some reform of the insanity defense. Many members of Congress wished to preserve some affirmative insanity defense but to delete the "volitional prong" of the Model Penal Code approach, *see supra* typescript at 17, and to shift the burden of proof. Other members of Congress, backed by the Justice Department, wished to abolish the insanity defense altogether. Even those favoring abolition, however, wished to preserve the defendant's right to use psychiatric evidence to prove lack of mens rea, and their bills explicitly did so.[9]

For example, Congressman Bill McCollum, who favored abolition, stated on the House floor:

> There is a longstanding principle in criminal law that no one can be convicted of any crime without having the requisite and necessary mental state of mind. If that person does not have the mental state of mind because he or she is suffering from a mental disease or defect, then

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9. Thus, those favoring abolition introduced bills that would limit the defendant's use of psychiatric evidence *only* to the mens rea issue. *See, e.g.*, S. 818, S. 1558 (97th Cong.) (presented by Senator Hatch); S. 2669 (97th Cong.) (presented by Senator Larry Pressler); S. 1106, 97th Cong. (presented by Senator Edward Zorinsky); S. 2572 (97th Cong.) (presented by Senator Joseph Biden); H.R. 47, H.R. 682, H.R. 1196, H.R. 1683 (98th Cong). For printings of the Senate bills, see *Limiting the Insanity Defense. Hearings before the Subcomm. on Criminal Law, Senate Judiciary Committee*, 97th Cong., 2d Sess. 37-38, 39-50, 53-59, 62-81, 3-31 (1982) (Committee Serial No. J-97-122).

> there is no way the prosecution can gain a conviction. Mr. Speaker, it is true that it is rarely argued or used today in criminal law. That is so because some years ago we gave the accused a second bite at the apple; that is the opportunity to present a so-called insanity defense as an affirmative defense, regardless of and in addition to the mental state of mind question that the prosecutor has to prove. My proposal . . . would be to abolish the second bite at the apple, do away with the separate insanity defense and allow some expert testimony on the question of the accused having a mental disease or defect as it bears on the state of mind issue . . . .

130 Cong. Rec. H9674 (daily ed. Sept. 18, 1984).

Eventually, the abolition approach did not triumph. Congress preserved a limited affirmative insanity defense. It did so, however, not because of doubts about the use of evidence to negate mens rea, but rather because it felt that concerns about the dangers of an insanity defense were overstated and because abolition "would alter that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment." *House Report* at 7-8.[10] In light of this legislative history, it

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10. Some legislators did wonder whether abolition of an independent insanity defense combined with admitting psychiatric evidence on mens rea might expand existing law. *See, e.g. 1982 Senate Hearings, supra* note 9, at 41-43 (remarks of Senator Heflin); *1982 House Hearings, supra* note 5, at 12-13 (prepared testimony of Senator Specter). As the House and Senate Report make clear, however, the Committees rejected the abolition approach because of a desire for an independent insanity defense, not because of concern for the provisions in the abolition bills guaranteeing the defendant's right to submit psychiatric evidence to negate mens rea. Members of the Justice Department supported the view that existing law admitted psychiatric evidence on the

would be ironic to view the acceptance of an affirmative insanity defense as a rejection of psychiatric evidence on mens rea.

D.

The government argues that even if Congress did not explicitly intend § 17(a) to bar evidence of mental abnormality on the issue of mens rea, we must do so to preserve an important element of the reform. The Insanity Defense Reform Act not only altered the definition of insanity, but it shifted the burden of proof to the defendant to prove that affirmative defense by clear and convincing evidence. Congress shifted this burden because of testimony that proving a defendant sane beyond a reasonable doubt was virtually impossible. The government contends that admitting evidence to prove a lack of mens rea effectively places the burden of proving a defendant's sanity back on the government.

Only in the rare case, however, will even a legally insane defendant actually lack the requisite mens rea purely because of mental defect. As the House Report stated: "Mental illness rarely, if ever, renders a person incapable of understanding what he or she is doing. Mental illness does not, for example, alter the perception of shooting a person to that of shooting a

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issue of mens rea. As Deputy Attorney General Rudolph Giuliani stated, the mens rea approach does not:

> "expand[] the number of opportunities for psychiatric testimony. . . . Those intents that you talk about are presently part of the law . . . , and it would presently be available to any defense lawyer to call psychiatrists to testify, that the person was unable to form the intent to commit the crime . . . ."

1982 House Hearings, *supra* note 5, at 36.

tree." *House Report* at 15 n.23. Similarly, a man who commits murder because he feels compelled by demons still possesses the mens rea required for murder. The government's burden of proving mens rea is therefore considerably less onerous than its previous burden of proving sanity.

On the other hand, evidence of mental abnormality may help indicate a lack of mens rea even when a defendant is legally sane. In *Staggs*, discussed *supra*, the defendant wished to use psychiatric evidence to bolster his claim that he did not threaten the policeman and therefore did not commit assault. Staggs did not claim to be insane and probably could not have done so successfully. Limiting evidence of mental abnormality only to the issue of insanity might therefore not merely shift a burden of proof but also completely preclude evidence that is relevant to guilt or innocence.

Finally, the government's request would require us to raise a serious constitutional question that Congress explicitly determined to avoid. Under *In re Winship*, 397 U.S. 358, 363-364 (1970), due process requires that the government prove every element of a criminal offense beyond a reasonable doubt. The defendant's right to present a defense to one of those elements generally includes the right to the admission of competent, reliable, exculpatory evidence, and the Supreme Court has struck down "arbitrary rules that prevent whole categories of defense witnesses from testifying." *Washington v. Texas*, 388 U.S. 14, 22, (1967) (striking down Texas statute prohibiting testimony of defendant's alleged accomplice); *see also Crane v. Kentucky*, 106 S. Ct. 2142 (1986) (reversing Kentucky conviction for excluding evidence of circumstances surrounding confession); *Chambers v. Mississippi*, 410 U.S. 284, 299-302 (ordering new Mississippi trial because, inter alia, trial court

excluded adverse witness' out of court confession). Evidentiary rules that would bar the testimony of the defendant himself, as would a rule barring all evidence of mental abnormality on the issue of mens rea, need particular justification. *See Rock v. Arkansas*, 107 S. Ct. 2704 (1987) (striking down state rule preventing defendant from testifying on issues previously the subject of his hypnosis). In light of these cases, a rule barring evidence on the issue of mens rea may be unconstitutional so long as we determine criminal liability in part through subjective states of mind.[11]

Furthermore, the mere fact that a defendant has the right to introduce psychiatric evidence in support of the affirmative defense of insanity does not justify barring the evidence from negating the government's case in chief. The Supreme Court has indicated that

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11. In *Bethea v. United States*, 365 A.2d 64, 83-92 (D.C. App. 1976), *cert. denied*, 433 U.S. 911 (1977), the D.C. Court of Appeals suggested that evidence of mental abnormality may and should be excluded from the issue of mens rea because it is not truly relevant to this issue. The court reasoned that mens rea exists as a legal fiction by which we infer a "guilty mind" from objective facts. Apart from those adjudged insane, "[t]he law presumes that all individuals are capable of the mental processes which bear the jurisprudential label 'mens rea.' " *Id.* at 87. While it is true "that the existence of the required state of mind is to be determined subjectively" reasoned the court, that subjectivity means only "that the issue must be resolved according to the particular circumstances of a given case." *Id.* at 87 (footnote omitted).

We disagree that the subjective requirement of mens rea exists only as a legal fiction for differentiating the "particular circumstances" in which we choose to punish criminal defendants. Whether a defendant considers a murder plot a practical joke or a serious effort may determine the defendant's criminal liability regardless of the objective circumstances. The fact that we can never determine a defendant's mental state with certainty, *see id.* at 87, is irrelevant to the fact that the law makes the subjective mental state an element of the offense. While the law presumes sanity, the law does not presume mens rea.

although a state may constitutionally shift the burden of proving insanity to the defendant, *Leland v. Oregon*, 343 U.S. 790 (1952), it did not sanction, and probably would not sanction, a jury charge that prevented a jury from considering evidence of mental abnormality in determining whether the state had proven premeditation and deliberation beyond a reasonable doubt. In upholding the verdict, the Court stated: "It is apparent that the jury might have found appellant to have been mentally incapable of the premeditation and deliberation required to support a first degree murder verdict . . . and yet not have found him to have been legally insane." *Id.* at 794.

More recently, in an analogous case, the Supreme Court has held that a state may place the burden on a defendant of proving self-defense. *See Martin v. Ohio*, 107 S. Ct. 1098, 1101-02 (1987). The Court indicated, however, that a state's right to shift the burden on self-defense does not include the right to prevent a defendant from showing self-defense in an effort to prove that she did not act with the mens rea of "prior calculation and design." *Id.* at 1102. The exclusion of such evidence "would relieve the state of its burden and plainly run afoul of *Winship*'s mandate" that the prosecution prove each element of the offense beyond a reasonable doubt. *Id.* at 1102 (citing *In re Winship*, 397 U.S. at 364).[12]

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12. Some older Supreme Court cases and some more recent cases from other courts of appeals have rejected constitutional challenges to the exclusion of psychiatric evidence on the issue of mens rea. *See Fisher v. United States*, 328 U.S. 463 (1946) (upholding decision of D.C. court not to instruct jury to consider evidence of defendant's borderline mental deficiency in deciding whether defendant who killed coworker who had complained about his work had done so with premeditation and deliberation); *Coleman v. California*, 317 U.S. 596 (1942) (per curiam) (summarily dismissing California pro se appeal challenging exclusion of evidence of mental abnormality on issue of mens rea);

Rather than challenging these Constitutional arguments, Congress, supported by the Justice Department, appears explicitly to have embraced them. In the words of Attorney General William French Smith, the abolition of the insanity defense coupled with the continued admission of psychiatric evidence to negate mens rea:

Campbell v. Wainwright, 738 F.2d 1573 (11th Cir. 1984), *cert. denied*, 106 S.Ct. 1652 (1986), (upholding Florida court's exclusion of expert psychiatric evidence because of potential jury confusion on insanity); *Muench v. Israel*, 715 F.2d 1124 (7th Cir. 1983), *cert. denied*, 467 U.S. 1228 (1984), (upholding Wisconsin rule limiting psychiatric evidence to insanity stage of bifurcated trial); *Wahrlich v. Arizona*, 479 F.2d 1137 (9th Cir.) (per curiam), *cert. denied*, 414 U.S. 1011 (1973) (upholding Arizona court's exclusion of psychiatric evidence offered by defendant to show that he could not have intended to "hold or detain" victim). As the court stated in *Wahrlich*, "the state of the developing art of psychiatry is such that we are not convinced that psychiatric testimony directed to a retrospective analysis of the subtle gradations of specific intent has enough probative value to compel its admission." 479 F.2d at 1138. These cases do not distinguish, however, as Congress has done, between the use of evidence to negate mens rea and a broader diminished capacity defense. The recent circuit court opinions also focus on the exclusion of expert opinion evidence, not on the exclusion of all evidence of mental abnormality, including the defendant's own testimony.

In any event, in judging constitutional attacks upon the exclusion of evidence, courts have focused not just on whether a state might determine the evidence to be inherently unreliable or irrelevant but also on whether the state had in fact made that judgment. If a state accepts a kind of evidence as relevant and reliable in some contexts, courts will carefully scrutinize their reasons for excluding that kind of evidence in another context. *See Washington*, 388 U.S. at 22-23 (because Texas law permitted accomplice to testify in situations presenting strong incentive to commit perjury, Texas could not preclude accomplice from testifying on behalf of defendant); *id.* at 25 (Harlan, J., concurring) (constitution is violated where "the State has recognized as relevant and competent the testimony of this type of witness, but has arbitrarily barred its use by the defendant"); *Hughes v. Mathews*, 576 F.2d 1250 (7th Cir.), *cert.*

> would abolish the insanity defense to the maximum extent permitted under the Constitution. . . . Under any approach, the Government will always be required to prove every element of the statutory offense that is charged. This includes any specific intent or knowledge required by the statute. In the rare case, therefore, in which a defendant is so deranged that, for example, he did not know that he was shooting a human being, one of the elements of the offense could not be proved--the mental element of mens rea--and he could not be convicted under current law or under any constitutionally supportable change in the law.

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dism'd, 439 U.S. 801 (1978) (Wisconsin could not exclude psychiatric evidence on issue of mens rea while accepting psychiatric evidence on many other issues). Even the cases upholding the exclusion of psychiatric evidence on mens rea, therefore, would appear to justify a blanket exclusion in federal cases only if Congress had determined that psychiatric evidence on the issue of mens rea was inherently irrelevant or unreliable.

Far from indicating such a Congressional determination, the legislative history of § 17(a) suggests that admitting psychiatric evidence on the mens rea issue may be more relevant and reliable than admitting it for the insanity defense. As those advocating the abolition of the Insanity Defense explained through a 1981 Report of the Senate Subcommittee on Criminal Justice:

> While the *mens rea* test, dependent as it is on the use of the phrase 'mental disease or defect,' may be said to suffer from some of the same vagueness problems [as the insanity defense] it should be noted that the reduction in availability of the defenses reduces the harm and impact of the necessary vagueness. Moreover, juries have traditionally dealt with the existence or non-existence of *mens rea* and this formulation, unlike the traditional insanity defense, poses no additional burdens on them.

S. Rep. No. 97-307, 97th Cong., 1st Sess. 105 (1981). We are unwilling on our own to find this use of psychiatric evidence inherently unreliable.

Hearings on Bills to Amend Title 18 to Limit the Insanity Defense, Senate Judiciary Committee, 97th Cong., 2d Sess. 30 (1982) (Serial No. J-97-126); *see also 1982 House Hearings, supra* note 5, at 25 (almost identical testimony by Associate Attorney General Rudolph Giulliani). Accepting this view, the House Judiciary Committee stated:

> By distinguishing the affirmative defense of insanity from the narrow mens rea/mental state requirements, the Committee's approach meets the constitutional requirement that the prosecutor prove all elements beyond a reasonable doubt while placing on the defendant the burden of demonstrating a reason for exculpation that presumes the existence of these elements.

House Report at 14.

We do not decide the constitutionality of any Congressional attempt to bar evidence of mental abnormality from the issue of mens rea. The constitutional issues are sufficiently substantial, however, that we are unwilling to create a rule of evidence that would raise them in the absence of explicit Congressional direction. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (in absence of clear Congressional direction, court should construe statute to avoid serious constitutional question). For all the foregoing reasons, we therefore reject the government's contention that the Insanity Defense Reform Act either explicitly or implicitly bars a defendant from introducing evidence of mental abnormality on the issue of mens rea.

IV. *Differentiating Mens Rea from Diminished Responsibility*

Although we reject the government's broader

argument, the Senate Report makes clear that § 17(a) does preclude defenses akin to partially diminished capacity or diminished responsibility. *Senate Report* at 229 (§ 17(a) abolishes "diminished responsibility" defense); *see also* 130 Cong. Rec. S 425 (daily ed. Jan. 30, 1984) (comments of Senator Laxalt) (§ 17(a) abolishes "diminished capacity" defense). The Senate Report indicates disapproval in this context not just of the creation of actual technical defenses but also of presenting the jury with "needlessly confusing psychiatric testimony." As the House Report and floor statements of Senator Hatch indicate, *see supra* typescript at 22-23, Congress focused its disapproval on the version of diminished responsibility adopted by the California courts in the 1960's and 1970's.

As the conflicting cases cited above indicate, the terms "diminished responsibility" and "diminished capacity" do not have a clearly accepted meaning in the courts. To the extent that American courts have adopted cognate doctrines, they generally have done so sub silentio. By reference to the careful work of many commentators heard and cited by Congress, however, we believe that we can identify the "diminished responsibility" defenses that Congress intended § 17(a) to prohibit. *See* Arenella, *supra* (cited in *House Report* at 15 n.24); Morse, *supra* (cited in *House Report* on other issues at 11, 16 n.28); *see also* Dressler, *Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse*, 75 J. Crim. L. & Criminology 953 (1984); Note, *Diminished Capacity and Diminished Responsibility: Irreconcilable Doctrines Confused in* State v. Wilcox, 14 Toledo L. Rev. 1399 (1983).

The first variant of what courts have called "diminished capacity" defenses inappropriately is the evidentiary doctrine which we have already noted is not a defense at all but merely a rule of evidence:

specifically, the admission of evidence of mental abnormality to negate mens rea.

A second strain of diminished capacity permits a defendant to show not only that he lacked the mens rea in the particular case but also that he lacked the *capacity* to form the mens rea. Whether a defendant has the capacity to form mens rea is, of course, logically connected to whether the defendant possessed the requisite mens rea. Commentators have agreed, however, that only in the most extraordinary circumstances could a defendant actually lack the capacity to form mens rea as it is normally understood in American law. *See* Arenella, *supra*, at 834. Even the most psychiatrically ill have the capacity to form intentions, and the existence of intent usually satisfies any mens rea requirement. Commentators have therefore argued that permitting evidence and arguments about a defendant's capacity to form mens rea distracts and confuses the jury from focusing on the actual presence or absence of mens rea. *See* Morse, *supra*, at 44-45 and Arenella, *supra*, at 863.

Finally, commentators have identified defenses generally categorized as "diminished responsibility" or "partially diminished capacity." Pure "diminished responsibility" exists in many European countries as a formal defense. It "permits the jury to mitigate the punishment of a mentally disabled but sane offender in any case where the jury believes that the defendant is less culpable than his normal counterpart who commits the same criminal act." Arenella, *supra*, at 829; *see also* Morse, *supra*, at 21-22.[13] Although such a formal defense is largely unknown in the United

13. According to Professor Arenella, "[t]he defense was first recognized by Scottish common law courts to reduce the punishment of the 'partially insane' from murder to culpable homicide, a non-capital offense. *See* HM Advocate v. Dingwall, [1967] J.C. 466." Arenella, *supra*, at 830 n.16.

States, many legal doctrines may work similarly. At least one controversial decision of the California Supreme Court, discussed below, effectively adopted such a defense.[14]

In addition to explicit doctrines of diminished responsibility, commentators have contended that courts may permit juries to excuse a defendant's criminal conduct because of mental abnormality and thereby covertly create a "partially diminished capacity" defense when they admit evidence of mental abnormality that does not truly negate mens rea. *See* Arenella, *supra*, at 844-49; Morse, *supra*, at 42-43. In some cases, defendants have attempted to present such theories of defense as the claim that a defendant lacked the mens rea to distribute cocaine because of the psychological domination of her mother. *See United States v. White*, 766 F.2d 22 (1st Cir. 1985). In others, psychiatrists have proved willing to testify that a defendant who planned and executed a murder did not possess the requisite mens rea because of a mental disease such as chronic schizophrenia. *See, e.g., Commonwealth v. Tempest*, 496 Pa. 436, 437 A.2d 952 (1981). Mens rea is generally satisfied, however, by any showing of purposeful activity, regardless of its psychological origins. Such testimony may therefore mislead the jury about the mens rea requirements of a crime.

The progression of cases in the California Supreme

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14. Many legal doctrines arguably constitute variations of diminished responsibility. For example, Professor Stephen Morse has argued that by reducing murder to involuntary manslaughter if a killing occurs under "extreme emotional disturbance" judged in part by the defendant's "personal handicaps," the Model Penal Code creates a form of diminished responsibility defense. Morse, *supra*, at 22-23 (citing II Model Penal Code and Commentaries 62) (Official Draft and Revised Comments 1980).

Court illustrates the distinctions between these various defenses.[15]

In *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949), the California Supreme Court considered the conviction of a prisoner for assaulting a prison guard with "malice aforethought," a more serious offense than simple assault. The defense had sought through expert testimony to show that the prisoner misinterpreted and overreacted to external stimuli to such an extent that he mistakenly believed he was defending himself. The trial court rejected this testimony, but the California Supreme Court, following a strict mens rea approach, held that this evidence should have been admitted. Obviously, if the defendant thought he was acting in self-defense, he could not have planned the crime in advance and therefore could not have acted with the mens rea of "malice aforethought." The court carefully distinguished between evidence showing that the defendant did not possess the required mental state and evidence showing the defendant incapable of entertaining the mental state.

In *People v. Gorshen*, 51 Cal.2d 716, 336 P.2d 492 (1959), however, the Court abandoned the distinction between evidence of intent and capacity to form intent and held admissible evidence of whether the defendant "could not and therefore did not deliberate" about committing a murder. 51 Cal.2d at 731, 336 P.2d at 502. The case also interpreted the mens rea requirement of premeditation and deliberation for first

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15. Our discussion of the California cases follows the analysis presented in a variety of commentaries. *See generally* Note, *Admissibility of Psychiatric Testimony in the Guilt Phase of Bifurcated Trials: What's Left After the Reforms of the Diminished Capacity Defense*, 16 Pac. L.J., 305, 309-16 (1984); *Irreconcilable Doctrines*, *supra*, at 1405-06; Arenella, *supra*, at 836-49; Morse, *supra*, at 25.

degree murder to require considered reflection. As a result, the Court ordered a retrial at which the defendant could use psychiatric evidence of his paranoid schizophrenia to show that he could not have reflected sufficiently to be guilty of first degree murder.

Finally, in *People v. Wolff*, 61 Cal.2d 795, 821, 394 P.2d 959, 975, 40 Cal. Rptr. 271, 287 (1964), the California Supreme Court effectively recognized a diminished responsibility defense. The defendant in that case had carefully planned and executed a series of murders and rapes. Despite unanimous psychiatric testimony to the contrary, the jury found the defendant sane. On appeal, the California Supreme Court considered whether the evidence had shown the defendant to be guilty of first or second degree murder. The distinction, the court held, turned on the "quantum of personal turpitude of the offenders" reflected in the extent to which the offender could meaningfully reflect upon the gravity of their acts. 394 P.2d at 976. Because the defendant's mental abnormality prevented him from realizing "the enormity of the evil," the court found that he was not guilty of first degree murder. In this way, the court made mental illness that did not directly correlate to any particular element of mens rea a ground for reducing the severity of an offense.

Other California cases took a similar approach. *See, e.g., People v. Poddar*, 10 Cal. 3d 750, 518 P.2d 342, 348 (1974); *People v. Conley*, 64 Cal. 2d 310, 322, 411 P.2d 911, 918 (1966).[16] These decisions

16. These cases guaranteed the defendant the right to present evidence of mental abnormality in an effort to reduce first degree murder to second degree or second degree murder to manslaughter because of the relevance of psychiatric evidence to such issues as whether the accused did his act for a "base antisocial purpose" or whether the accused was able to understand the duty not to commit acts causing grave injury.

eventually led a broad alliance of political forces through referendum to abolish the defense of diminished capacity. The new law abolished the use of evidence to show that a defendant lacks the capacity to form mens rea. The law, however, explicitly permitted the use of evidence of mental disease to show that a defendant actually lacked mens rea. *See* Cal. Penal Code § 28 (as amended) (The amendment restricted use of this evidence only to specific intent crimes.).

As the California experience points out, the strict use of psychiatric evidence to negate mens rea may easily slide into wider usage that opens up the jury to theories of defense more akin to justification. In rejecting the "diminished responsibility" defenses as accepted by California courts, Congress barred these theories of justification from consideration by juries. Only the first of our typology of "defenses" is permissible, namely the use of evidence to prove that a defendant actually lacked mens rea.

In light of the strong danger of misuse, we join other circuits that have directed district courts to examine proffered psychiatric testimony carefully "to determine whether the proof offered is grounded in sufficient scientific support to warrant use in the courtroom, and whether it would aid the jury in deciding the ultimate issues." *Bennett*, 539 F.2d at 53; *see also Demma*, 523 F.2d at 986; *Brawner*, 471 F.2d at 1002. As this case shows, however, expert psychiatric evidence is not the only evidence of mental abnormality bearing on mens rea, for a defendant or other witnesses may testify about mental abnormality. Courts should also be careful in deciding whether to issue jury instructions or to permit defense arguments directing the jury to consider whether any evidence of mental abnormality negates mens rea. Notions of intent, purpose and premeditation are malleable and at their margins imprecise. But the limits of these

concepts are questions of law. District courts should admit evidence of mental abnormality on the issue of mens rea only when, if believed, it would support a legally acceptable theory of lack of mens rea. In deciding such a question, courts should evaluate the testimony outside the presence of the jury. *Brawner*, 471 F.2d at 1002.

We note one particular area of caution relevant to this case. As Professor Morse theorizes, psychiatric testimony suggesting that a defendant lacks mens rea may often focus not on the defendant's intent but on the defendant's awareness of intent:

> At nearly all times, human beings are conscious of themselves, they perceive and are aware of what they are doing as they do it. . . . This self-reflective split in consciousness that allows self-monitoring is an important regulator of behavior, for it provides constant feedback that allows us to correct maladaptive behaviors. . . . [Is the state of lacking self-awareness a state] in which mens rea is lacking? On the one hand, the defendant knows at some level what he is doing and intends to do it; on the other hand, he is not fully conscious of his actions in the usual sense. I believe that this situation is better handled as a matter of affirmative defense. Mens rea is present but the usual control structures are compromised.

Morse, *supra*, at 46-47 (footnotes omitted).

Professor Morse's point is that a lack of self-reflection does not mean a lack of intent and does not negate mens rea. We agree.

> Criminal responsibility must be judged at the level of the conscious. If a person thinks, plans and executes the plan at that level, the criminality of his act cannot be denied, wholly or

> partially, because, although he did not realize it, his conscious was influenced to think, to plan and to execute the plan by unconscious influences which were the product of his genes and his lifelong environment. –

State v. Sikora, 44 N.J. 453, 210 A.2d 193, 202 (1965).

V. *Application of the Standard to This Case*

As we construe the Insanity Defense Reform Act, Congress did not intend to bar all evidence of mental abnormality from the jury's consideration of mens rea, but it did require the exclusion of evidence that does not support a legally acceptable theory of a lack of mens rea. Deciding whether Pohlot's evidence was admissible under that standard, while superficially difficult, is ultimately straightforward. Pohlot testified that all his efforts to hire Selkow to murder his wife were "a fantasy." Dr. Glass testified that Pohlot "did not really know" what hiring Selkow meant until it was discussed in the context of psychiatric treatment. Dr. Glass testified, in essence, that Pohlot's real hope was not to kill his wife but to live with her again.

All of these statements, taken out of context, could suggest that Pohlot did not know the consequences of his plotting and did not intend to achieve the death of his wife. Because the district court instructed the jury that Pohlot could be found guilty only if he "intended that the murder of his wife be committed," these statements at first appear to be relevant and admissible.

Rather than focusing on Pohlot's conscious mind, however, the testimony focused on what Pohlot "really" knew. Pohlot acknowledged that he was attempting "to fight back." Dr. Glass agreed that Pohlot transacted a cash transaction "for the purpose of killing his wife." Similarly, Dr. Glass testified that Pohlot knew in some

senses what he was doing, "but he didn't know." Thus, according even to the defense, whatever Pohlot "really" knew and intended, at least a substantial part of his mind knew and intended exactly what were the natural consequences of his plotting.

Placed in the context of the remaining evidence, it is clear that Pohlot acted with considerable awareness of what he was doing and with considerable purpose. Pohlot engaged in careful activity, over a lengthy period of time, sending first a deputy and then engaging in several phone calls and personal meetings all directed at one purpose: hiring someone to murder his wife. Pohlot came to a firm agreement, made payment, and expressed concern and took action to assure that the crime was not ultimately traced to him.

In the context of the facts, both Pohlot's own testimony and that of Dr. Glass relate clearly not to Pohlot's intent in a legal sense but to Pohlot's meaningful understanding of his actions and their consequences. We often act intending to accomplish the immediate goal of our activity, while not fully appreciating the consequences of our acts. But purposeful activity is all the law requires. When one spouse intentionally kills the other in the heat of a dispute, he or she will rarely at that moment fully appreciate the consequences of the murder. The spouse is guilty of homicide nonetheless.

Taken in context, suggestions that Pohlot did not intend Selkow to commit murder focuses not on Pohlot's conscious mind but on his unconscious. To accept this theory as a defense to mens rea requires manipulation of the concept of intent beyond what the "intent" element of 18 U.S.C. § 1951(a) requires. Pohlot therefore offered his evidence of mental abnormality in support of a legally unacceptable theory of lack of mens rea that amounts covertly to a variation of the partially diminished capacity defense precluded

by § 17(a). Whether the district court applied this correct analysis or accepted the incorrect broader view advocated by the government, it was correct in instructing the jury under the circumstances not to consider this evidence in deciding whether Pohlot possessed the requisite mens rea.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix 4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 85-00354-01
v.	:	
STEPHEN POHLOT	:	

MEMORANDUM AND ORDER

KELLY, J. MARCH 27, 1986

Presently before this Court is defendant Stephen Pohlot's motion for judgment notwithstanding the verdict and in the alternative defendant seeks a new trial. Defendant, in support of his motion for a new trial, argues: (1) that the court erred in denying his motion for acquittal as to Count V at the close of the prosecution's evidence, (2) that the court erred in permitting certain testimony of witness George Neustadt (Neustadt) being entered into evidence, over defendant's objections; (3) the court erred in admitting certain testimony of expert witness Robert DiSilverio, M.D. be admitted into evidence, over defendant's objections; (4) the court erred in refusing to charge the jury in accordance with certain specific requests of defendant, over the objection of the defendant.

The defendant was convicted based upon a jury verdict, for one count of conspiracy to commit murder-for-hire in violation of 18 U.S.C. §371 and §1952A, three counts of use of interstate commerce facilities in the commission of murder-for-hire in violation of 18 U.S.C. §1952A, and two counts of aiding and abetting another to use interstate commerce facilities in the crime of murder-for-hire in violation of 18 U.S.C. §§2 and §1952A.[1]

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1. Section 371 states in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

I first will address defendant's contention that a judgment of acquittal should be granted notwithstanding the verdict of guilty. Rule 29 of the Fed. R. Civ. P. permits the court to grant an acquittal, and states specifically –

> **(c) Motion after Discharge of Jury.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

When the court reviews a motion for acquittal after the jury returned a guilty verdict the court, must review the evidence and any legitimate inferences in light most favorable to the

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NOTES (*Continued*)

Section 1952A states in pertinent part:

> (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State of the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, shall be fined not more than $10,000 or imprisoned for not more than five years or both; . . . .
>
> (b) As used in this section and section 1952B—
>
> (1) 'anything of pecuniary value' means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; and
>
> (2) 'facility of interstate commerce' includes means of transportation and communication.

Section 2 states in pertinent part:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

government. The court should not weigh the evidence or test the credibility of the witnesses. *U.S. v. Martorano*, 596 F. Supp. 621, 624 (E.D. Pa. 1984) *aff'd*, 767 F.2d 63 (3d Cir.), *cert. denied* 88 L.Ed. at 296 (1985); *U.S. v. Mancini*, 396 F. Supp. 75 (E.D. Pa. 1975). Here the government introduced several tape recordings of the defendant. One recording was of conversations between defendant's co-conspirator, George Neustadt and Melvin Michael Selkow (Selkow), the government informant discussing the possibility of obtaining an assassin for defendant Pohlot. Other tapes were of conversations between defendant himself and the government informant Selkow making and concluding a deal or "contract" for the assassination of defendant's wife. The government informant was paid a down payment of $8,000 by defendant as consideration and partial payment on the "contract". Further, the government produced a video tape of one meeting between Selkow and defendant Pohlot. Both the government informant Selkow and the co-conspirator Neustadt testified on the government's case.

The defendant did not deny the bulk of the evidence of the government's case.[2] The defendant contended that he withdrew from the conspiracy. It must be noted that to withdraw from a conspiracy is not a defense to acts committed prior to the withdrawal. Defendant further offered an affirmative defense of insanity.[3] The defendant offered an expert witness concerning his mental state during the period the criminal acts were

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2. The defendant did contest the government's position and evidence offered by the government which suggested that defendant withdrew from the conspiracy only at the prodding of the government informant Selkow. Defendant contended at trial that he withdrew from the conspiracy because he realized that an assassination was going to take place.

3. Title 18 Section 20 States:

(a) Affirmative defense. — It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof. — The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

committed. The government offered an expert witness who testified as to the defendant's mental state during the period the criminal acts were committed. The evidence produced by the government was sufficient to support a guilty verdict; and the jury's guilty verdict was not contrary to the weight of the evidence. Hence, I must deny defendant's motion for acquittal.

I now turn to defendant's alternative relief sought. Defendant contends that it was error for the court to deny defendant's motion for acquittal as to Count V at the close of the prosecution's case. Count V states:

> THE GRAND JURY FURTHER CHARGES:
>
> On or about August 13, 1985, STEPHEN POHLOT, defendant herein, willfully aided, abetted, counseled, commanded, induced and procured the commission of an offense in that he caused GEORGE NEUSTADT on or about August 13, 1985, to use a facility of interstate commerce, that is, a telephone, with intent that a murder be committed in violation of state law as consideration for the promise and agreement to pay anything of pecuniary value, in that GEORGE NEUSTADT caused the Cooperating Witness [informant] to place a telephone call from the Eastern District of Pennsylvania to him (GEORGE NEUSTADT) in the State of New York in which NEUSTADT proposed the murder-for-hire of another individual.

The fact that the cooperating witness called the co-conspirator back constituted a separate offense. The defendant was found guilty of being an aider and abettor of the co-conspirator, George Neustadt, *see* note 1, *supra*. Defendant contends that the cooperating witness' decision to call Neustadt back should not be imputed upon the defendant. However, where it is foreseeable that a perceived party would use interstate commerce in carrying out the illegal plan, then such use will be imputed against all the parties to the illegal plan.

U.S. v. Barbieri, 614 F.2d 715, 720 (10th Cir. 1980). Thus, my denial of defendant's motion for acquittal as to Count V was proper.

Defendant contends that it was error for the court to overrule defendant's objection to certain testimony of Neustadt. Neustadt, in the government's case, testified as to what Pohlot told him, that the government informant Selkow told Pohlot. Specifically, Meustadt stated that Pohlot told him that Selkow told Pohlot that Selkow believed his phone was bugged, and that to throw off any government agents, Selkow told Pohlot to call him on the "bugged" phone and call off the assassination contract. When defendant Pohlot testified in the defendant's case he asserted that such a conversation between himself and Selkow never occurred. Further, Pohlot testified that he decided to call off the assassination contract when he realized he was not in a "fantasy". It should be noted that the government informant Selkow testified in the government's case and testified that he told Pohlot to call on the "bugged phone" to call off the assassination.

The testimony of Neustadt which related certain out of court statements made by Pohlot was properly admitted as an admission of Pohlot. Fed. R. Evid. 801(d)2(A). Furthermore, the defendant Pohlot testified and was subject to cross examination concerning his conversations with Neustadt and Selkow. The government informant Selkow testified and was subject to cross examination concerning his conversations with the defendant Pohlot.

In *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F. Supp. 1190, 1266 (E.D. Pa. 1980) *vacated on other grounds*, 631 F. 2d 1069 (3d Cir. 1980), Judge Becker noted that "hearsay" within admissions, although not strictly within Fed. R. Evid. 805 is nevertheless bound by 805.[4] However, Judge Becker was reviewing admissions not by a party under Fed. R.

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4. Rule 805 states:

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Evid. 801(d)2(A), but rather admissions which were imputed upon a party because of a statement by an agent or co-conspirator under Fed. R. Evid. 801(d)2(C),(D), or (E). *See also Sedeck v. Hamiltonian Federal Savings and Loan Association*, 551 F.2d 1136 F.2d 1136 (8th Cir. 1977) (agent of defendant's admission which included a statement made by third person not admissible). The fact that Pohlot himself made the statements here, I find a distinguishing factor.

Moreover, the statement concerning what Selkow told Pohlot, to which Neustadt testified was not offered for the truth of the matter asserted. Rather, the statement that Pohlot was told by Selkow to call off the assassination went to Pohlot's state of mind or motive at the time he attempted to withdraw from the conspiracy and to avoid possible detection by the government who Selkow asserted may be bugging his phone.

Further, the fact that the informant Selkow testified and was subject to cross examination, and Pohlot testified and was subject to cross examination, permitted the jury to determine exactly what was said and ultimately resolve, if it determined it was necessary, whether or not Selkow had, in fact, told Pohlot to call off the assassination. For all these reasons, I find that it was not error in allowing Neustadt to testify as to what Pohlot had told him of an earlier statement made by Selkow to Pohlot.

Next I will address defendant's assertion that it was error for the court to allow, over the defendant's objection, the admission of certain testimony of the government's expert witness. Specifically, defendant claims it was error to allow Robert DiSilverio, M.D., to testify that defendant knew exactly what he was doing in his dealings with Neustadt, the co-conspirator, and Selkow, the government informant, and that all of the defendant's claims to the contrary were merely self-serving statements. The court speicfically requested a transcript of DeSilverio's testimony. After reviewing the transcript, it discloses that DeSilverio did not testify as defendant suggests. Accordingly, I need not address defendant's objection on this point since the objectionable testimony did not occur.

Last, defendant Pohlot argues that the court's instructions to the jury concerning the intent required for commission of the

offenses and the insanity defenses were incorrect; *thus it precluded the defendant the use of a diminished capacity defense*. Defendant has not produced a transcript of the court's jury charge, nor has the defendant urged the court that the court should provide the defendant with a copy of the transcript because of his lack of funds. The court is cognizant of the fact that the defendant, by his own testimony, stated that he was a wealthy individual and had transferred approximately one million dollars in securities through a friend while he was in prison awaiting trial. This neglect by defendant has needlessly burdened the court.

Defendant asserts that the court instructed that the jury should first consider the insanity defense and once it disposed of that issue, if it determined that the defendant was not legally insane, then it was to determine defendant's guilt or innocence. Further, defendant contends that the jury should have been instructed that it could consider the psychiatric evdence in resolving the issue of whether or not defendant had the specific intent required to commit the offenses he was charged with.[5]

First, I will address the mode in which I instructed the jury; contrary to defendant's position I did not instruct the jury that they first should resolve the insanity defense issue before determining the actions of the defendant. Turning to the second matter defendant raises concerning the jury instructions, defendant contends that if the jury does not find him guilty by reason of insanity, it may nevertheless consider the psychiatric evidence offered in the affirmative defense in determining whether or not defendant had the necessary intent or *mens rea* to commit

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5. Defendant complains that I did not adopt request No. 43 of his proposed charges to the jury. No. 43 states in relevant part:

> You are not to consider this defense unless you have first found that the government has proved beyond a reasonable doubt each essential element of an offense. One of these elements is the requirement of specific intent to have his wife murdered, on which you have already been instructed. In determining whether that requirement has been proved beyond a reasonable doubt you may consider the testimony as to the defendant's abnormal mental condition.

the offenses charged. Thus it appears that defendant is asserting a diminished capacity defense. I refused to make such a charge to the jury.

Title 18 Section 1952A is a crime of specific intent, *see* note 1 *supra*. The statute not only requires that a certain act be committed, but also it requires a specific state of mind, namely with intent to have a murder committed in violation of law. In essence, the specific intent requirement goes to the act of murder. Defendant's argument suggests that the specific intent to have his wife murdered was absent, because he was acting out of a fantasy and never intended to have someone murder his wife. Defendant contends that the court should have instructed the jury that it could consider the psychiatric testimony offered by defendant concerning the insanity defense, when it determined if the defendant harbored the requisite specific intent to have his wife murdered.

Title 18 Section 20[6] provides for an affirmative defense when the defendant can establish by clear and convicing evidence that the defendant was at the time of the commission of the act constituting the offense, laboring under a severe mental disease or defect which resulted in the defendant being unable to appreciate the nature and quality or wrongfulness of his acts. Otherwise, Section 20 precludes the use of mental disease as a defense.

At first gloss it is apparent that the legislative branch of our government decided to exclude all psychiatric evidence except that which is relevant to establish insanity. I find it relevant to note that several of the states have limited psychiatric testimony admission only to determine the sanity of the defendant. In *West Virginia v. Flint*, 142 W.Va. 509, 96 SE 2d 677 (1957) the court excluded certain expert psychiatric testimony concerning the

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6. Section 20 states:

(a) **Affirmative defense.**—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

mental age of the defendant who had killed his wife and was subject to a prosecution for premeditated murder. The court denied the admission of the psychiatric evidence, quoting an earlier decision of the court, and held:

> A person partially insane is yet responsbile for a criminal act if at the time of the act he knows right from wrong, and knows the nature and character of the particular act and its consequences, and knows that it is wrong, and is hurtful to another, and deserves punishment. . . .

Id. at 683 (citations omitted). *See generally* Annot. 22 ALR 3d 1228, 1235 (1968).

From reviewing the insanity defense statute 18 U.S.C. §20, note 6 *supra*, Congress has taken the view that mental conditions relating to an abnormality or defect is an "all or nothing" defense, that is to say, either the defendant must be able to establish insanity pursuant to the statute otherwise psychiatric abnormalities or defects are not relevant.

Further, the legislative history of 18 U.S.C. §20 concerning the availability of the use of psychiatric evidence outside the insanity defense reveals:

> The Committee also included language in section 20 explicitly providing that mental disease or defect other than that which renders the defendant unable to appreciate the nature and quality or wrongfulness of his acts does not constitute a defense. This is intended to insure that the insanity defense is not improperly resurrected in the guise of showing some other affirmative defense, such as that the defendant had a 'diminished responsibility' or some similarly asserted state of mind which would serve to excuse the offense and open the door, once again, to needlessly confusing psychiatric testimony.

98th Congress Report No. 98-225, P.L. 98-473.

For all the reasons stated, I find that it was not improper to deny defendant's request that the court instruct the jury that it may consider the psychiatric testimony of defendant's abnormal mental condition in evaluating the defendant's intent to commit

the offenses charged, outside the affirmative defense of insanity. In reaching this conclusion I have considered a recent district court decision from the Northern District of California. In *U.S. v. Frisbee*, 623 F. Supp. 1217 (N.D. Cal. 1985) the court allowed introduction of psychiatric testimony to show that defendant did not have the specific intent to commit the murder; this ruling was made over the government's objection that psychiatric testimony concerning possible mental defects of the defendant are only admissible in an insanity defense pursuant to 18 U.S.C. §20, note 5 *supra*. *But see: United States v. White*, 766 F.2d, 22, 24-25 (1st Cir. 1985) (appellate court would not abandon prior rule against allowing psychiatric testimony to establish a "diminished capacity" defense in light of the passage of the comprehensive Crime Control Act which abolished the diminished capacity defense.) For the reasons already stated I reject the court's holding in *Frisbee*.

An appropriate order follows.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 85-00354-01
	:	
v.	:	
	:	
STEPHEN POHLOT	:	

ORDER

AND NOW, this 27th day of March, 1986, for the reasons set forth in the foregoing Memorandum, it is ORDERED that defendant's motion for acquittal or in the alternative for a new trial is DENIED.

BY THE COURT:

JAMES MCGIRR KELLY, J.